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Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

Filed Feb. 18 1899.

No. 340.

STANTON WARBURTON, PLAINTIFF IN ERROR,

vs.

AMELIA McDONALD AND MATILDA B. WHITE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Brief in Opposition to the Motion to Dismiss or Affirm.

F. D. McKENNEY,
For Plaintiff in Error.

STANTON WARBURTON,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-25-'98

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In Walston *vs.* Nevin, 128 U. S., 578, 579, the Chief Justice, delivering the opinion of the court, said:

"We only require the printing of so much of the record as will enable us to act understandingly without referring to the transcript,"

thus voicing in a negative fashion the well-established practice of the court, which requires so much of the record

as may be necessary to enable the court to act understandingly without referring to the transcript, to be printed for submission in connection with the motion to dismiss or affirm.

No portion of the record in this case has been printed. Plaintiff in error disputes the verity of many statements contained in the brief in support of the motion, and denies that the conclusions deduced therefrom are applicable to the facts as disclosed by the transcript of the record on file in the clerk's office.

It is plain that the court cannot act upon the motion understandingly without reference to the original transcript of the record, and, in accordance with established practice, the motion to dismiss or affirm should be denied.

2.

The only question at issue in this case is one of law, and it turns upon the application of a **STATE** statute to a pre-existing contract,—the plaintiff in error, who was the plaintiff below, contending that such statute, if applicable to pre-existing contracts, is unconstitutional and void, because obnoxious to article one (1), section ten (10), and article fourteen (14) of the amendments of the Constitution of the United States.

The question was raised in the trial court, and was preserved on the record by appropriate exceptions filed in the cause *before the entry of the decree* by the trial judge. It was crystallized in the assignments of error which accompanied the plaintiff's appeal to the supreme court of the State of

Washington, and it was the sole question which was before that court for decision.

In both courts the decision was in favor of the applicability of the statute and against the contention of plaintiff in error. To review the judgment of the highest court of the State sustaining the validity of the **STATE** statute plaintiff in error has brought the case here.

The record distinctly presents a Federal question, which, in view of the conclusions of this court announced in *Edwards vs. Kearzey* (96 U. S., 595), and since repeated, cannot be said to be either frivolous or to have been raised for the purposes of delay.

F. D. McKENNEY,
For Plaintiff in Error.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This was an action begun by the plaintiff in error Warburton in the superior court of the State of Washington for Pierce county on June 2, 1897, to quiet title to lot one (1), in block eleven hundred and five (1105), in the city of Tacoma.

The property involved was "community property" under the laws of Washington, and the issue to be determined is whether the interest of the husband in and to said property

is to be measured by the law of the Territory applicable thereto and in force at the time of the acquisition of the property by the "community" or by an after-enacted statute, which, having been adopted as a law of the newly erected State, is alleged by the defendants to have had the effect of reducing the interest of the husband in the property and enlarging that of the children of the wife, she having predeceased him.

Besides the defendants in error, Matilda B. White and Amelia McDonald, one Ellen T. Nelson was also named as a party defendant (p. 1), but, having relinquished all claim to the property in suit and the income thereof (pp. 9–10, 18), the action was by stipulation dismissed as to her (p. 12).

The case was tried upon an agreed state of facts, the gist of which, as found by the trial court, is as follows, viz:

(1.) E. G. Bacon and Sophia, his wife, were married in California, October 5, 1873, and lived together in the matrimonial estate until July, 1880, when the latter died intestate (p. 17).

(3.) Amelia McDonald and Matilda White were the lawful children of said Sophia, begotten of a former marriage, and, together with the above-named Ellen T. Nelson, were all of the heirs-at-law of E. G. and Sophia Bacon and each of them (p. 17).

(1 and 2.) October 10, 1873, said E. G. and Sophia Bacon removed to and became residents of the then Territory of Washington, and during the year 1877 the former, with community funds acquired subsequent to and during their marriage, purchased the property above described, and they immediately took up their residence therein (p. 17).

(4.) In July, 1880, Sophia died intestate, leaving her husband and her two children, the defendants in error, surviving her (p. 17).

(5.) April 8, 1895, E. G. Bacon being then alive, the plain-

tiff in error Warburton obtained a judgment against him in the superior court of the State of Washington for Pierce county on an indebtedness incurred in August, 1892, and on the 2d day of March, 1896, the sheriff of Pierce county, under an execution issued to satisfy said judgment, sold said property to said Warburton, and the sale was thereafter duly confirmed by said court. The time for redemption under the law having fully expired, the sheriff aforesaid, on the 4th day of May, 1897, conveyed by a sufficient deed to said Warburton "all the right, title, and interest of E. G. Bacon in and to the property aforementioned" (p. 18).

Subsequent to such sale E. G. Bacon died intestate, and on the 12th day of October, 1897, Ellen T. Nelson conveyed all her right, title, and interest in and to the property to said Warburton (p. 18).

During the progress of the suit and before judgment in the trial court, the defendant McDonald sold and conveyed all her estate, interest, and claim to said property to the defendant White (p. 18).

At the time Mr. Bacon purchased this property there were in force in the Territory of Washington two statutes enacted by the territorial legislature, one entitled "An act defining the rights of husband and wife," enacted in 1873, and the other entitled "An act to regulate the descent of real estate and the distribution of personal property," enacted in 1875.

So much of the law of 1873 as is necessary to be considered in this case is as follows, viz:

"SEC. 1. *Be it enacted, etc.*, That all property, both real and personal, of the wife, owned by her before marriage, and that acquired afterward by gift, bequest, devise, or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise, or descent, shall be his separate property.

"SEC. 2. All property acquired after the marriage by

either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property.

"SEC. 9. The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate." * * *

So much of the law of 1875 as is necessary to be considered here is as follows:

"SEC. 2. Upon the death of the husband or wife, the whole of the community property, subject to the community debts, shall go to the survivor, but nothing herein contained shall be construed to conflict with laws exempting property from attachment and execution, and especially the provision securing the homestead to the survivor, and all property except as an allowance for support of the family."

The act of the territorial legislature approved November 14, 1879 (the property in controversy having been purchased by E. G. Bacon with community funds "during the year 1877"), entitled "An act relating to and defining the property rights of husband and wife," provided, among things, that:

"SEC. 12. Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts.

"SEC. 13. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies."

"SEC. 31. This act shall not be construed to operate retrospectively, and any right established, accrued or accruing, or anything done prior to the time this act goes into effect shall be governed by the law in force at the time such right was established or accrued."

"SEC. 32. All acts and parts of acts in any manner conflicting with the provisions of this act, or on the subject-matter thereof, be and the same are hereby repealed."

NOTE.—The acts above referred to are printed in full as an APPENDIX to this brief.

The Territory of Washington was by proclamation of the President admitted into the Union November 11, 1889 (26 Stats. L., p. 1552).

The constitution of the State, adopted in convention August 22, 1889, and ratified by the votes of the people October 1, 1889, provides, among other things, as follows:

"ARTICLE 1, SEC. 2. The Constitution of the United States is the supreme law of the land."

"ARTICLE 1, SEC. 23. No bill of attainder, *ex post facto* law, or law impairing the obligations of contracts shall ever be passed."

ARTICLE 27, SCHEDULE. "In order that no inconvenience may arise by reason of a change from a territorial to a state government, it is hereby declared and ordained as follows:

"SECTION 1. No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by a change in the form of government, but all shall continue as if no such change had taken place; and all process which may have been issued under the authority of the Territory of Washington previous to its admission into the Union shall be as valid as if issued in the name of the State.

"SEC. 2. All laws now in force in the Territory of Washington, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: * * *

"SEC. 16. The provisions of this constitution shall be in force from the day on which the President of the United States shall issue his proclamation declaring the State of Washington admitted into the Union," * * *

Such was the statute law in Washington when the indebtedness of E. G. Bacon, which subsequently merged into the judgment in favor of Warburton and resulted in the sale of the above property to the latter, was incurred.

Subsequent to such sale E. G. Bacon died intestate, and thereupon arose between Warburton and the defendants,

the children of Sophia Bacon, the dispute which ripened into this action.

The plaintiff Warburton contended that under the above-quoted provisions of the law of 1873 E. G. Bacon was in effect the sole owner of this property, and if not, then under the law of 1875 the right on the death of his wife to succeed to the entire community property by virtue of survivorship was vested in him; that both of said laws entered into and became part and parcel of the contract of purchase under which he and Sophia became possessed of the property, and the law of 1879, thereafter enacted by the territorial legislature and continued in force by Article 27, section 2, Schedule, of the constitution of the State of Washington, could not lawfully be applied so as to deprive him of any vested rights or interest in said property.

The defendants, on the other hand, contended that E. G. Bacon was not the sole owner of the property, but that his rights in the premises were governed and limited by the act of 1879, which provided that upon the death of either husband or wife one-half only of the community property should inure to the surviving husband or wife, as the case might be, and the remaining half should descend to the heirs of the deceased spouse. Under such contention the defendants McDonald and White each claimed to be entitled to an undivided one-sixth interest in said property.

Plaintiff at the trial, which was had before the court without a jury, before any findings of fact or conclusions of law had been proposed or entered, raised Federal questions, to wit:

That if the act of 1879 should be held applicable to the matter in controversy, it would impair the obligations of the contract of purchase under which E. G. Bacon became possessed of the property in controversy, contrary to article 1, section 10, of the Constitution of the United States, and

would deprive him and his successors in interest and assigns of property without due process of law, contrary to article 14 of the Constitution of the United States (pp. 12, 15, 16).

Nevertheless the trial judge announced as a conclusion of law upon the facts found—

2. That the defendant Matilda B. White is the owner of and entitled to a decree herein quieting her title to an undivided one-third of the property in controversy in this action. * * *

3. That the defendants Matilda B. White and Amelia McDonald have and recover of and from the plaintiff in this action the costs and disbursements to be taxed herein.

To such findings and conclusions, when propounded and before signature, plaintiff still further objected upon the above specific grounds (pp. 15, 16), and his objections having been overruled the court made and signed the findings proposed by the defendants (p. 21) and entered judgment accordingly (pp. 21, 22), to all of which plaintiff duly excepted (pp. 21, 23).

Upon appeal to the supreme court of the State of Washington the judgment of the trial court was affirmed (pp. 30–32) and a writ of error to review such judgment of affirmance was sued out from this court.

ASSIGNMENT OF ERRORS.

It was error on the part of the supreme court of the State of Washington, in affirming the judgment of the superior court of Pierce county, to hold that sections 12 and 13 of the Territorial act of November 14, 1879, as continued in force by article 27, section 2, of the constitution of the State of Washington, defined and limited the rights of the sur-

viving husband and his successor in interest in community property acquired prior to its enactment, the Constitution of the United States to the contrary notwithstanding.

JURISDICTION.

The supreme court of the State of Washington having declared the law of 1879 to apply to community properties acquired prior to its passage, as well as subsequent thereto, it might be thought that this court is bound by such construction, notwithstanding the express provision of the law itself to the contrary; but the validity of the law when so construed and applied to prior-acquired community estates is a different matter, and if it should appear that such application results in the impairment of an existing contract or the diminution of an existing vested property right, a constitutional question at once arises which is reviewable by this court.

In connection with the first suggestion, however, it must be remembered that this court has appellate power to revise the judgment of the supreme court of a State whenever such a court has adjudged that not to be a contract which has been alleged in the forms of legal proceedings, by a litigant, to be one within the meaning of that clause of the Constitution of the United States which inhibits the States from impairing the obligations of contracts.

Independently of all adjudication by the supreme court of a State, this court has jurisdiction to decide whether the instrument amounts to a contract and is within the protection of the Federal Constitution.

McCullough *vs.* Virginia, 172 U. S., 102.
Columbia Water P. Co. *vs.* Columbia, &c., Co., 172 U. S., 475.

Under the laws in force in Washington at the time of the purchase by E. G. Bacon of the property in suit he was

clothed with "the entire management and control of the common property, with like power of absolute disposition during his own lifetime as of his own separate estate," and with an absolute right of survivorship to the whole estate.

His estate or interest in the community property was more nearly akin to a fee-simple than to any other estate. His power to manage, control, and alien or otherwise dispose of it during his own lifetime and that of his wife was absolute, and upon her death, leaving him surviving, it became his in fee-simple absolute.

These laws entered into and became as much a part of the contract of purchase under which Bacon acquired the property as if they had been spread at large in the deed by which it was conveyed to him.

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement."

Walker *vs.* Whitehead, 16 Wall., 314.

"All laws of a State existing at the time a mortgage or any other contract is made which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts." * * * "All contracts between private parties are made with reference to the law of the place where they are made or are to be performed. Their construction, validity, and effect are governed by the place where they are made and are to be performed, if that be the same as it is in this case. It is, therefore, said that these laws enter into and become a part of the contract."

Brine *vs.* Hartforn F. Ins. Co., 7 Otto., 627.

In applying the act of 1879 as a rule or measure by which to determine the interest of E. G. Bacon and his successor in interest in and to this property, the State courts have declared that his interest in the property existing at the date

of the passage of that act was thereafter diminished to the extent of taking away his right;—

(1.) To sell, give away, or mortgage the same;

(2.) To contract separate debts and make such property liable therefor, and

(3. Upon the death of his wife intestate one-half thereof at once descended to and became vested in the legitimate issue of her body.

Such an application of the law clearly impaired the rights which were vested in him by the contract of purchase. It altered the status of the husband and wife towards community property theretofore acquired and to that extent established a new marriage contract for them, without the assent of either. To the extent that it diminished the interest of either in or to such community property it impaired the obligation of their marriage contract theretofore existing and also the contract of purchase under which the property had been acquired, and to such extent it is and was unconstitutional.

Bronson *vs.* Kenzie, 1 How., 311.
Edwards *vs.* Kearzey, 96 U. S., 515.
Barnitz *vs.* Beverly, 163 U. S., 118.

Contracts are executed as well as executory. The constitutional prohibition applies alike to both classes by whomsoever made. The amount of the impairment of the obligation is immaterial. If there be *any*, it is sufficient to bring into activity the constitutional prohibition and the judicial power of this court to redress the wrong.

Von Hoffman *vs.* Quincy, 4 Wall., 535.

"Grants are consequently as much within the constitutional safe-guard as agreements to sell or convey; and the legislature cannot revest the title in the grantor, or, as it

would seem, transfer it to a third person, consistently with the obligation which they are forbidden to impair."

Hare's Am. Const. Law, ed. 1888, vol. 1, p. 585.

Fletcher *vs.* Peck, 6 Cranch, 87.

The prohibition does not become inoperative on the transfer of the contract, property, or franchise to a third person, and may, on the contrary, inure to his benefit where it would not have protected the original covenantee or grantee.

Thompson *vs.* Perrine, 103 U. S., 806.

There are under such circumstances two contracts—one express between the original parties, the other implied from the money paid or acts done by the assignee in the belief that he will acquire a valid title by the transfer, and the latter may be obligatory, although the former was viated by fraud and might be set aside.

It is urged by defendants in error that, while the sovereign State is prohibited from passing laws impairing the obligation of a contract, the several Territories heretofore organized have, through their territorial legislatures, free and untrammeled right so to do, and that there is no constitutional prohibition against their passing such laws.

The organic act establishing the Territory of Washington contained the following provision:

"SEC. 1851. The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.

It would be inconsistent with the Constitution of the United States for the territorial legislature to pass a law impairing the obligation of a contract. That is not a "rightful subject of legislation" under our Constitution. The territorial legislature had only such powers

as were delegated to it by Congress, and this section specifically withholds from it the right to infringe upon any of the provisions of the Constitution.

"SEC. 1891. The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."

This court will hardly say that the constitutional provisions under which protection is there claimed were locally inapplicable to any Territory of this Union. No provisions of the Constitution are so frequently violated, whether wilfully or unwittingly. Territorial legislatures are as prone to error in this regard as those of States. Territories are as much within the prohibitions of article 1, section 10, of the Constitution as are States. The word "States" is used in that article and section in a generic sense—*e. g.*:

"No State shall enter into any treaty, alliance or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, pass any bills of attainder, *ex post facto* law, or law impairing the obligations of contracts, or grant any title of nobility."

If the prohibition were against "States" as such only the Territories would be without the prohibition, and any one of them could enter into a treaty, alliance, or confederation with any other Territory or country; could grant letters of marque and reprisal, coin money, emit bills of credit, make anything a tender in payment of debts, pass bills of attainder and *ex post facto* laws, and grant titles of nobility. Even apart from the provisions of the organic act above quoted, we think this court will not yet declare that a Territory possesses such powers. If it lacks one it lacks all.

Besides, by section 2 of the constitution of the State, all laws in force in the Territory of Washington not repugnant

to that constitution were continued in force until they expired by their own limitation or were altered or repealed by the legislature.

The people of the State of Washington in adopting the constitution thereby adopted and in a legal sense re-enacted all the territorial statutes then in force, which included this territorial law of 1879. All territorial statutes so continued in force thus became STATE laws so as to bring them within the inhibition of the Constitution of the United States.

At the time of the adoption of the law of 1879 as a law of the State of Washington E. G. Bacon was alive and in full possession of the entire property. He was alive at the time of its sale by the sheriff, and did not cease to be until after the sheriff had deeded it to the plaintiff in error (p. 14). Not until after his death, in 1897, so far as this record discloses, did defendants in error assert any claim thereto. It was then, as a law of the STATE, that the provisions of the act of 1879 were invoked, and as a law of the STATE it was administered by the STATE courts into the cause and given controlling effect.

The Law of 1879 as Applied by the State Courts also Contravenes the Fourteenth Amendment of the Constitution of the United States.

It is indisputable that every right guaranteed by laws in force at the time of the purchase of this property and applicable thereto, constituted in E. G. Bacon a vested property right. Such rights cannot be abrogated by legislative acts without contravening the constitutional provision that no one shall be deprived of his property without due process of law. E. G. Bacon being the owner, or admittedly at least a part owner, of the property, there was no limitation on any of his rights except such as the law prescribed; but we have just seen that there were no statutory limitations, but, on the contrary, he was given

ALL property rights therein. Any legislative act attempting to take away any of these rights without compensation and without opportunity to be heard is an attempt to take his property without due process of law. The fact that the legislature did not attempt to seize it for the benefit of the State, but did attempt to make it a free gift to his wife's children, does not in any manner change the application of the constitutional provision. Under this point it makes no difference what were the particular provisions of the deed so long as it is admitted that in 1878 the fee passed to Mr. Bacon and he became the sole or part owner of the premises. By such admission it is conceded that all the property rights conferred upon him by the laws in force at such time vested in him.

Westervelt *vs.* Gregg, 12 N. Y., 202.

The effect of the act of 1879 as construed and applied by the lower courts is to deprive E. G. Bacon of one-half of the property which he rightfully understood at the time of its purchase vested in him, subject only to community debts. It is at best an attempt to deprive him and his successor in interest of property without due process of law.

The Federal Question was Raised in Due Time and in the Proper Manner.

This was an ordinary code action to quiet title to lands in Washington.

The defendants under the State practice in their answer merely set up that they each owned an undivided one-sixth interest in the property. On the trial, so soon as it was perceived that they were relying upon the provisions of the law of 1879, and their relationship to Sophia Bacon, plaintiff at once filed what amounted to a demurrer to their contention (R., p. 12), and the constitutional objections thereby raised were insisted upon at every stage of the case thereafter.

They were pressed upon the notice of the trial court, both before and after it announced its findings of fact and conclusions of law (pp. 12, 15, 19).

They were preserved by an exception to the decree (p. 23) and urged before the supreme court of the State, both on the original argument and on petition for rehearing (pp. 30, 31).

They were thereby properly and sufficiently preserved for re-examination here.

Murdock *vs.* Memphis, 20 Wall., 590, 628.
Sayward *vs.* Denny, 158 U. S., 180.
Oxley Stave Co. *vs.* Butter Co., 166 U. S., 654, 655.
California Nat'l Bank *vs.* Kennedy, 167 U. S., 362.

The validity of the law of 1879, as applied in this case, was indeed the only matter in dispute from the very beginning. The validity of that law was at every stage of the case drawn in question. The Federal question cropped out on the trial and before judgment in the trial court. It sufficiently appears in the record.

Columbia Water Power Co. *vs.* Columbia., &c., Co., 172 U. S., 475.

DISCUSSION ON THE MERITS.

I.

UNDER THE LAW OF 1873, MR. BACON WAS THE SOLE OWNER OF THE PROPERTY.

As we have shown heretofore, the law of 1873 was a part of Mr. Bacon's contract of purchase. In order that this court may have before it the basis of our contention and argument on this point we will here again set out the provisions of said act which we claim constituted Mr. Bacon as a matter of fact and law the sole owner.

"SEC. 2. All property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property."

"SEC. 9. The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate."

One may look in vain through the whole act (see appendix) to find a single property right given the wife. The claim that she is the equal owner under the law of 1873 has no basis in any section, line or word of the act. There is not a word in the whole act giving to the wife any right to or dominion over the community property.

Under the law as enacted, the husband had the sole, exclusive right to sell, to mortgage, to convey, to give away, to squander if he chose, devise the property. He had the right to its possession and the rents and profits. What other right of property is there? We know of none. The legal title in this case was in Mr. Bacon and under the law the beneficial interest

was also his. The wife could not prevent him from disposing of the property as he saw fit. She could not prevent him from mismanaging or squandering it. The community property was liable for the husband's debts. The separate property of the husband was liable for the community debts. In fact there was no distinction so far as the husband was concerned between his separate and community property. He had just as large a beneficial interest in the one as in the other.

By the law of 1873, the husband could accumulate nothing but community property. Every dollar that he earned—every dollar that he saved was, and could be nothing else than, community property. If he earned a salary of ten thousand dollars a year every cent was community property. If by skill and superior management of his business affairs he should accumulate a fortune, every dollar was community property. In no way known to the law could he add one dollar to his separate estate. It was doubtless for these reasons that the legislature gave the husband full ownership of the community property.

A case decided by the supreme court of California is in point. The law of 1873 was identical with the law of California prior to its amendment in 1892, except the right of testamentary disposition was withheld from the husband. The section is as follows:

"The husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate."

Section 172, 2 Deering's Codes, California.

In 1892 the legislature amended the above by pro-

viding that the husband could not give away community property. Prior to the passage of the amendment Mr. Spreckles had obtained a large amount of stocks which after the amendment was enacted he gave to his son and the question came before the court whether the law of 1892 could and did take from Mr. Spreckles the right of gift. The court says:

"Now, then, we have this state of the case: The statute provides that the husband and wife may hold property as community property. Section 161. It defines what shall constitute community property. It defines ownership (Section 654), and then gives to the husband complete legal ownership of the community property (Section 172), and confers upon the wife no element of ownership whatever. Courts and counsel have occasionally endeavored to find some property right in the wife, or some respect in which the husband's interest falls short of full property. I think it will be universally admitted that so far there has been a complete failure in this respect. The first attempt shown by our reports of that kind is in Godey vs. Godey, 39 Cal. 157. In that case it is said that, while no other technical term so well defines the wife's interest as the phrase 'a mere expectancy,' * * * it is at the same time * * * so vested in her that the husband can not deprive her of it by his will, nor voluntarily alienate it for the mere purpose of divesting her of her claim to it. * * We derived the system of community estate from the Mexican law, which prevailed here before the acquisition of the territory. The system was unknown to common law, and it has no better name for the interest of the wife during marriage than a 'mere expectancy.' The Mexican jurists spoke of it as a feigned and fictitious ownership, or as merely nominal, and it is contrasted with ownership of the husband. That is called the actual or true ownership.

* * * In Van Maren vs. Johnson, 15 Cal. 308, it is said that the estate of the common property is in the husband, and he may dispose of it as he can of his seperate estate: the interest of the wife being a mere expectency. Guice vs. Lawrence, 2 La. Ann. 226, is cited as authority. In Packard vs. Arellanes, 17 Cal. 525, that case is again cited as authority, in which it is said that during the life of the husband the wife cannot say she has gananciales—that is, community property—but the husband, during marriage, is '*real y verdadero dueno de todos, y tiene en eel effecto su dominio irrevocable;*' where, too, the interest of the wife was said to be revocable and fictitious. In Escriche, under 'Bienes Gananciales,' it is said that the husband owns the community property, both nominally and in fact—*en habito y en acto;* while the wife's ownership is only nominal—*en habito*—becoming an actual estate upon the dissolution of the marriage. In Ballinger on Community Property, the Mexican law is stated as above—the wife had only a feigned or fictitious estate which ripened into a legal estate upon the termination of the marriage. * * * It is suggested that the sole ownership of the community property—if it be conceded to the husband—is vested in him by statute, and may be taken from him by statute. All ownership has been said to be the offspring of law, but it does not therefore, follow that all property rights can be divested by law. In fact I see no connection between the premise and the conclusion. Whether the law of the marriage relation can be changed so as to affect the status of property acquired thereafter is another question. The community property, as a rule, constitutes the earnings, gains, and savings of a man during his whole lifetime. If he can make presents to his friends, provide for indigent relatives, or make advancements to his children, it must be from this property. To deprive him of this power is certainly to divest him of a property right. This argument need not, however, be

pursued further, because counsel admit that, if the husband is the owner of the property, then a statute which makes the exercise of the right to dispose of it subject to the will of another is unconstitutional.

"Entertaining these views, it is unnecessary to consider the other contention under this head, that the amendment violates the obligations of a contract. It is clear, I think, that the operation of the amendment must be confined, at least, to community property acquired after its passage."

Spreckles vs. Spreckles, 48 Pacific Reporter, 228. 116 Calif., 339.

We earnestly ask the court to consider not only the portions of the case above quoted, but the whole case. It is not only authority on the above propositions, but it sets forth at some length the civil law on the same questions, and shows that the civil law is identical with the decision itself on the points covered.

The Supreme court of New Mexico in two decisions just rendered reviews the civil law on the same propositions to a large extent, and comes to the same conclusion. The opinion of said court is in part as follows:

"The wife under the Mexican law, was clothed with the revocable and feigned dominion and possession of one-half of the property acquired by her and her husband during the coverture. During this period the husband is the head of the community, and the law invests him with discretionary power in all matters pertaining to its business or property. In fact, its business is conducted and its property acquired in his name, and his authority in the administration of its affairs is exclusive and absolute. The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property vests in the husband, and

for all practical purposes he is regarded by the law as the sole owner. It is true, the wife is a member of the community, and is entitled to an equal share of the acquests and gains, but not so long as the community exists; her interest is a mere expectancy, like that which an heir possesses in the estate of an ancestor, and possesses none of the attributes of an estate, either at law or equity."

Barnett vs. Barnett, 50 Pacific Reporter, 339.
Crary vs. Field, 50 Pacific Reporter, 342.

The Supreme Court of Louisiana has reached the same conclusion as each of the above courts as to the proprietary interests of each spouse.

Dixon vs. Dixon, 4 La., (O. S.) 188.

This distinction must also be borne in mind. The civil law as known in Mexico prevailed in Texas, New Mexico and California; and as known in France, prevailed in Louisiana, prior to their acquisition by the United States. And they retained the civil law except as modified by statute. The decisions of the highest courts of those states all recognize this, and the decisions are thus controlled by that law. This is not true of Washington. The state of Washington was in an early day a part of the territory of Iowa; then part of the territory of Oregon. In neither of these territories had the civil law ever prevailed, and its rules have never controlled in the courts. No part of the civil law ever prevailed in this state, save what we have adopted by statute. In all other matters the common law prevails.

The defendants in error cannot cite us to a single decision or recognized text-writer that does not sup-

port the the foregoing statement as to the civil law wherever the same has prevailed, either France, Spain or Mexico. The conclusion that the husband is the sole owner of community property under any law similar to that of 1873 is irresistible and justified by a unanimity of authorities.

It will be observed that this law of 1873 is very different from community laws of several of the states such as Louisiana and Texas in this; that the laws of those states specifically provide that upon the death of the wife, the husband's right of dominion over the property ceases and a share of the community estate goes to the heirs of the wife. In this law there is no such provision or limitation of the husband's interest in or right to the property. The rights conferred are given to him unrestricted for life. No contingent devestiture of any part by death of the wife or otherwise is provided for. There is not a word or syllable in the statute to the effect that the husband's right to sell, mortgage etc., should be in the slightest abridged by the death of the wife, (See law of 1873, appendix. or by any other contingency, nor was there anything in the act that can be contrued into any such meaning. If the legislature had intended that any part of the community property should, upon the death of the wife, go to her heirs, it would have used some language appropriate to express such an intent. It would also have been necessary to establish a rule providing who were to be her heirs. But it not only failed to do this, but on the contrary did give to the husband full and complete ownership of the the community property for life. Further than this it gave to the husband full right of testamentay disposition of the property. These

are the words of the statute. "The husband shall have the entire management and control of the common property with like absolute power of disposition as of his own separate estate." A will is a disposition of property to take effect after the death of the party making it. It is different from a deed in this that a deed can only take effect during the life of the maker. The one is clearly as much of a disposition of property as the other. The one is as clearly within the words of the statute as the other. As stated by Mr. Jarman in his work on wills, volume I section 18, "a will is an instrument by which a person makes a disposition of his property to take effect after his decease." We think this court is bound to say that the law as it was enacted gave to the husband the power to dispose of the community property by will. This being true the conclusion is irresistible that the husband was clothed with full ownership of the community property under the law of 1873. It is true that the legislature could and subsequently probably did by the law of 1875 take from the husband the right of testamentary disposition, as we think it well settled that the right of testamentary disposition of one's property is not a vested right. But whether or not the husband had the right of testamentary disposition is of value in construing the law of 1873 in measuring the rights given the husband. It shows clearly that the legislature intended to confer upon the husband full ownership. It would not attempt to give him the right to devise property not his own.

1. *The Statute of 1873 construed by the rules of the common law, makes the husband the sole owner.*

In the foregoing we have discussed the point un-

der consideration on the theory that the law of 1873 should be construed by the rules of the civil law, and thus for the sake of argument yielded to the contention of defendants in error. But this is not the construction that should be applied. Up to 1869 the common law of England, insofar as it affected property rights, was in force except as modified by statute in this state. In 1869 a law identical with the law of 1873 was enacted. The law of 1869 was repealed by the enactment of another law in 1871. This law of 1871 was repealed by separate act approved on November 5th, 1873, as follows:

"Be it enacted, etc., That the act entitled An act defining the rights of persons and property as affected by marriage, passed by the house of representatives November 22, 1871; by the council November 28, 1871, and approved by the governor November 29,1871, be and the same is hereby repealed."

On the 14th of the same month the act of 1873 became a law; thus leaving a hiatus of nine days during which time the old common law as modified by statutes passed prior to 1869 in full force and effect. On the 13th of November, one day before the act of 1873 took effect, the following statute enacted by the same legislature became a law:

"Be it enacted by the Legislative Assembly of the Territory of Washington, That the common law of England, so far as it is not repugnant to, or inconsistent with the constitution and laws of the United States and the organic act and laws of Washington Territory, shall be the rule of decision in all the courts of this Territory."

Session Laws 1873, pp. 3 and 4.

In fact ever since the territory was organized the

common law of England has been in force and its rules of construction have always been applied. A statute similar to the above has always been in force. See Session Laws Washington Territory, 1855—6, p. 7; Session Laws Washington Territory 1862—3, p. 81; Session Laws 1869, p. 3.

So at the time of the passage of this act the common law of England as modified by statute was in full force and effect. The real property laws were then and prior to that date similar to those that prevail in the great majority of states in the union. If the rules of the common law relative to the construction of statutes prevail, there can be but little question that our contention that under the law of 1873 the husband was the sole owner of the community property is correct.

In the first place, the law of 1873 must be strictly construed as in derogation of the common law rights of the husband over property acquired subsequent to marriage, and insofar as it affected any change from the common law, it cannot be carried beyond that clearly expressed by the words of the statute.

Sections one and two of the statute provide what shall be community property and what not. If the statute should end there, who would pretend to say what the rights of the husband and wife were under such a law? It could not be said that the civil law was thus adopted. If so, what branch of the civil law? That of Rome, the Justinian Code, or as known in France, changing from century to century; or as known in Spain, or Mexico, or Louisiana, in which countries the law is essentially and in many respects radically different? What would be the rights as construed by

the common law? No court we think would pretend to say. But the judgment of any court would necessarily be that such statute was void for uncertainty. The fact that the legislature merely designated a certain class of property by the name of common or community property would in itself mean but little.

What rights the legislature intended to confer on either husband or wife must be wholly gathered from the other sections of the act, it being borne in mind that under the common law, all earnings of the husband and wife were his, and all property purchased with such funds the title to which was taken in his name was his own. As has been before said, there is not a section, line or word in the act that can be construed to confer upon the wife any right to, dominion over, or interest in, the community property; but, on the other hand, as we have heretofore shown, the act of 1873 did confer upon the husband every right in property known to the law.

What is property?

The legislature of California adopted the definition of property proposed to it by the Code Commission, the controlling spirit of which was the late famous found jurist, Field, and it is probably as good a one as can be anywhere.

"The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others."

California Code, section 654.

Anderson defines property as follows:

"Property is 'that which is one's own; something that belongs or inheres exclusively in an individual person.'

"In an abstract sense, ownership, title, estate, right."

"The right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the rights of every other individual in the universe. The 'absolute right of private property' consists in the free use, enjoyment and disposal of all one's acquisitions, without any control or diminution, save only by the law of the land."

Anderson's Legal Dictionary, under title Property.

Abbott gives the following definition:

"Exclusive legal right to control and enjoy a thing; ownership; title."

"A right indefinite in point of user, unrestricted in point of disposition, and unlimited in point duration. In this sense it is the highest right a person can have in a thing, and is distinguished from a life-interest or an interest for years, on the one hand, and from a servitude or easement, on the other."

Also "A right indefinite in point of user, but limited in duration; as, for instance, a life-interest."

Abbott's Legal Dictionary under title Property.

Bouvier's is as follows:

"The right and interest which a man has in lands and chattels to the exclusion of others."

"Property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person without any consideration, or even throwing them away."

Bouvier's Law Dictionary under title Property.

The converse of these statements must be true, that he who has complete dominion over a certain property and the full right to sell and encumber, alien or destroy it, the right to its possession and to use and enjoy it, cannot be other than the full and complete owner of it. Whether or not he is full owner of such property is measured by the fact that he has such an unlimited control of it in his own right.

"Ownership is essentially indefinite in its nature, but in its most absolute form it involves the right to possess and use or enjoy the thing, the right to its produce and accessions, and the right to destroy, encumber, or alien it, or, as the civilians express it, ownership gives the *jus utendi, fruendi, et abutendi;* but the exercise of these rights may be restricted in various manners, and the owner may part with them or limit them in favor of other persons. So long, however, as the grantees have only definite rights of user over the thing, and the original owner retains an indefinite right, he is still the owner."

Anderson defines ownership:

An owner "is he who has dominion over a thing, which he may use as he pleases, except as restrained by the law or by an agreement."

"Ownership is the right by which a thing belongs to an individual, to the exclusion of all other persons."

Bovier's definition is:

An owner is "he who has dominion of a thing real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases,—even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right."

We maintain that the law gave the husband just those rights which he had in property that he had purchased and taken in his own name before the enactment of the law of 1869.

This intent is clearly shown by the sixth section of the statute. It gives the husband the same rights in and the same control over the separate estate of the wife that she had under the common law. The law of 1871 had abolished the right of dower and curtesy. This legislature, as we have shown, *supra*, repealed by separate act the law of 1871, thus reviving the right of dower and curtesy as it existed under the common law.

The construction of the statute of 1873 first came before the courts of the state of Washington in 1882. in the case of Holyoke v. Jackson, four years after Mr. Bacon acquired this property, and three years after the law of 1879 went into effect.

That is the leading case relied on by the defendants in error and the same reasoning is followed in the case of Mabie v. Whittaker, 10 Washington, and incidentally in other cases.

We think, after reading that case, this court will agree with us that no state was ever worse afflicted by an early decision of its courts, or by one in which there was less of good reasoning or more thoroughly unsound and vicious in its tendencies. Mr. Holyoke had acquired a certain piece of property while the law of 1873 was in force. After the law of 1879 went into effect he sold it, as he legally might do under the law of 1873. The question before the court was whether he could legally sell the property without the consent

of his wife. The law of 1879 having gone into effect before the sale was made. The court held that the power of the husband to sell was not a vested right under the law of 1873, and that the law of 1879 could and did take from the husband the right to sell property acquired even prior to its enactment. A part of the opinion is as follows:

"Management and disposition may be vested in either one or both of the members. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community. This power the statute of 1873 chose to lay upon the husband, while the statute of 1879 thought proper to take it from the husband, and lay it upon husband and wife together. As the husband's 'like absolute power of disposition as of his own separate estate,' bestowed by the ninth section of the act of 1873, was a mere trust conferred upon him as member and head of the community in trust for the community, and not a proprietary right, it was perfectly competent for the legislature of 1879 to take it from him and assign it to himself and wife conjointly. This was done."

Holyoke v. Jackson, 3 Wash. Ter., 239.

And again:

"The rights referred to in the thirty-first section of the act of 1879 are proprietary rights, and not such naked power of management, control, or disposition as are devolved upon any married person to be exercised in trust for the community. Therefore, all the provisions of the act of 1879 which operate to create, vary, or assign powers of that description are applicable to property previously acquired. By section 8 of the

statute of 1879, the husband is clothed with a certain trust in respect to community real property."

Holyoke v. Jackson, 3 Wash. Ter. 240, 241.

The above decision is based on the following propositions:

1. That under the law of 1873 the rights of husband and wife were equal in community property acquired under such law.

2. That the right of entire management, control and conveyance was not a vested right but was a maked trust or agency conferred upon the husband.

1. *The rights of husband and wife were not equal under the law of 1873, as is clearly shown by the following analysis of the act.*

a. The husband had the right to sell community property. The wife had no such right, nor could she prevent her husband from selling it.

b. The husband could mortgage the community property. The wife could not, nor could she prevent her husband from so doing.

c. The husband could give away the community property. The wife could not, nor could she prevent her husband from so doing.

d. The husband could contract a debt and pay it out of the community property. The wife could not.

e. The husband could devise such property. The wife had no such right.

f. The husband had a right to the possession of the rents and profits. The wife had not.

Then where did the court get the authority for such a statement. Not in the statute, as we have

shown. Not in the civil law in any country where it prevails in any form. Not in the common law most certainly.

The writer of the treatise on Community Property in the American and English Encyclopaedia of Law, Second Edition, Volume 6, page 338, reaches the same conclusion that we do with reference to the case of Holyoke v. Jackson, using this language:

"The reasoning of this case is hardly satisfactory. Prior to 1879, the husband held the complete dominion over, and the right by his sole deed to convey or encumber, community real as well as personal property. By the Act of that year it was provided that he should not convey community real estate without the joinder of his wife. This Act was held to be operative as to real estate acquired before its passage, on the ground that the husband had no vested right by his sole deed to convey community real estate, that his right to convey was a mere statutory power held by him in trust for the legal entity known as the community, and that he suffered no loss of vested right by the law which took from him and gave to himself and another the right to convey. The reasoning of this case is opposed to the recent case of Spreckels v. Spreckels, 116 Cal. 339, in which it was held that the husband's right to make a gift of community property could not, constitutionally, be taken away from him. Again, the theory that the husband's dominion is a mere power in trust can scarcely be reconciled with the admitted right of his separate creditors to take community personalty in satisfaction of their demands. With an execution against the trustee, the property of the *cestui que trust* should not be taken."

It must be remembered that the law of 1873 is very different from the law of Texas and Louisiana,

whose community property statutes provide that, upon the death of the wife one-half of the property goes to her heirs, subject to the community debts. But the statutes of California, Nevada and Idaho are very similar, if not almost identical, with that of 1873, and, as said in the American and English Encyclopædia of Law, Sec. Ed., Vol. 6, page 347, "In California, Nevada and Idaho the husband, as survivor, takes the entire community estate as absolute owner, and, as a necessary consequence, the heirs of personal representatives of the deceased wife cannot interfere with the community property."

There is another reason why we may say that the legislature did not intend to make the property rights of husband and wife equal. As we have shown *supra* the legislature of 1873 repealed the law of 1871 by separate act nine days before it enacted this law. The law of 1871 did make husband and wife practically equal owners of the community property acquired while it was in force as will be seen by reference to the session laws of 1871, page 67. The following portions clearly show this.

"Sec. 10. The separate property of the wife and her share of the common property shall be liable for all valid indebtedness of the wife contracted before the marriage, but the separate property of the husband shall not be liable for such indebtedness.

"Sec. 11. The separate property of the husband shall not be liable for indebtedness of the wife which shall be constracted during the marriage, unless he shall join her in the incurrence of the same in writing, or shall become responsible for the same in writing after its incurrence, except such indebtedness shall be incurred for the necessary comforts or welfare of the

family; and when so incurred, the separate property of both husband and wife shall be liable when there shall not be sufficient available common property to satisfy such indebtedness and cover costs."

By section 13 the wife could go into court and restrain the cusband from mismanaging the community property and compel him to make "her share" of the community property good.

"Sec. 22. The common property being partnership property, the wife's share shall be one-half thereof and shall be hers and her heirs' forever; and her share of the common property may be increased so as to be more than one-half, by the wife's compliance with the provisions of section five of this act."

If the legislature intended that the rights of husband and wife should be equal under the law of 1873, why did it repeal the law of 1871 which did give the wife a half interest in such property, and enact a new law, giving her absolutely no interest in it, and making the husband the sole owner. In fact this is the only difference between the two laws. This change was not made accidentally. Its only purpose could be to give, as it did, the full ownership of community property to the husband.

2. *If the husband had only equal property rights with the wife in community property under the law of 1873, and the sole power to convey, and the right to contract debts and pay for them out of community property, then he could not be deprived of either of these rights without an impairment of his contract.*

How can a husband be deprived of the very valuable right to manage and dispose of community property without at the same time endangering his proprietary interests? Was it not a valuable right in a hus-

band to manage and control the community property so that acquests and gains might be large, because whatever his proprietary interests were in such property such interests would be increased as the community property was increased. If a husband had been engaged in manufacturing lumber from 1873 to 1879, and in the conduct of such business had built up a large and prosperous business, and had accumulated and invested therein large sums of money, where the preservation of the property as well as its future success depended upon peculiar skill and business experience along such lines, would it be no damage or injury to him in his share in property already accumulated, and his share in future profits, to take from him all or a part of the management of such a business and lay it on another who was without business experience or skill? The same would be true of almost any business in which a husband was engaged. Take the management and control from the husband and subject it to the will of another, and you make it possible that no acquests and gains can be had, and endanger those already earned. It is a misnomer to speak of the husband as a mere naked agent in his management and control of community property in which it is admitted he has proprietary interests, and which he has given years of his life to acquire. When we speak of a naked agent we mean a party who has no proprietary interest in the property, but who is simply managing and controlling the property of another for hire.

It is admitted that Mr. Bacon or any other husband at the date of the passage of the law of 1879 had large proprietary interests in the community property

acquired. We think it ought to be conceded that whatevert hese proprietary rights were they were rights which never could be taken from him during his life. Then, if an agent, his agency was coupled with an interest, and if such, then the agency was irrevocable.

"To make a power irrevocable, unless expressly declared so, there must be an interest in the thing to be disposed of or managed. A sharing in the profits of sale is not enough. The interest must be in the land itself, like a title to land. Thus in the case of Bergen v. Bennett, and Wilson v. Troup, the mortgagee had a power of sale which was held not to determine with the death or alienation of the estate by the mortgagor. In Hunt v. Rousmaniere, Chief Justice Marshall thus defines what is meant by 'a power coupled with an interest:' 'Is it an interest in the subject on wnich the power is to be exercised? or is it an interest in that which is produced by the exercise of the power? Who hold it to be clear, that the interst which can protect a power after the death of a person who creates it must be an interest in the thing itself; in other words, the power must be engrafted *on an estate* in the thing.' After stating that a power to A to sell for his own benefit would not give him an interest, nor would it if his powen was to sell for the benefit of B, he adds: 'A power to A to sell for the benefit of B, ingrafted *on an estate conveyed* to A, may be exercised at any time, and is not affected by the death of the person who created it. It is then a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing which enables him to exercise it in his own name, and is therefore not dependent on the life of the of the person who created it.

"Such a power of sale may be assigned to another person by a conveyance of all the interest of the donee of the power, and may be exercised by such assignee.

* * If the power is coupled with an interest, the execution of it is not only a matter of right and election in the donee, but the power becomes annexed to the estate."

Washburn on Real Property, (Fifth Ed.) Vol. 2, pp. 719—20.

Let us again look at the law of 1873, which is the instrument creating this so-called agency in the husband. By that law every dollar he earned was to be his to manage and control, and, as the court says, he was to have a proprietary interest in it. Every dollar earned and saved was a dollar to be used by this agent to earn other dollars. Every thousand dollars so acquired was a large force and factor under skillful management to be used in further accumulations. Each thousand dollars added to this fund gave such an agent increased working power, together with his individual earning power for further accumulated gains, all of which accumulations and gains, it is admitted, the so-called agent was to share. Can it be said that after a large, or even a small, fund was so accumulated, it would not be an injury to such a so-called agent to take from him the power to manage and use these funds so that other accumulations and gains might be made, of which he was to have his share? Deprive such an agent of the power to sell and dispose of such property with which to pay debts contracted in accumulating the property, and you not only deprive him of possible further acquests and gains, but you reduce him to bankruptcy. Suppose A is the owner of property and he appoints B his agent and gives B a proprietary interest in the property. By the agreement B is to have the

absolute and sole management and disposition of the property during his life, and a "proprietary interest" in all the accumulations and gains that B might acquire by the use of the property, together with his skill and earning power. Suppose the law gave to the longest liver under such a contract the right of survivorship, could A ever terminate that agency, or deprive B of the management or control of such property? Could A, or could any legislature deprive B of the right of survivorship? If A by any method should prevent B from enjoying his full right under the contract, could he not be enjoined from so interfering? Or, if not, would he not be liable in damages for breaking (for impairing) the contract?

We say unhesitatingly that such a theory or rule making the husband a mere naked trustee, has no support of authority or reason; nor has it any support in the civil law or common law; nor have defendants in error been able to produce a single other authority to support such a rule.

a. Under the law of 1873 the husband could give away the property if he say fit, and neither wife nor any other individual could call him to account. Whoever before heard that a naked trustee could give away his trust property and not be personally liable to account therefore?

b. Under the law of 1873 the common property was liable for the separate debts of the husband and could be seized and sold to satisfy the same. What court has ever before held that trust property in the hands of a naked trustee could be sized and sold to satisfy the separate debt of the naked trustee?

c. If the husband had mismanaged the community property acquired under the law of 1873, no one could have compelled him to account therefor. Can a naked trustee mismanage and squander his trust property and yet not be called upon to make good whatever he squandered of his trust fund ?

d. If the husband was a naked trustee created by the statute of 1879, and a part or all the power to convey could be taken from him by the statute of 1879, then the same statute might have provided that neither husband nor wife nor both jointly could convey the property acquired under the laws of 1873 and 1875 without the consent of some third party. Or the legislature could even have gone further and taken the sole power to convey from both and cast it upon some third party.

We think the foregoing shows clearly that the rule that a husband under the laws of 1873 was a mere naked trustee is wrong. Whenever it is conceded that his interest in the property is beyond that, it must be held that whatever his rights are in the community, they are vested rights and none can be taken from him without at the same time lessening the interest of the husband in such property.

During the space of time between 1873 and November, 1879, while the laws of 1873 and 1875 were in force, all the contracts made by the husband, the law conclusively presumes, were made by him with a view to such laws then in force. It was a valuable right in the husband to satisfy his separate debts, etc., out of the community estate, a right which no one will dispute the creditor could enforce. If the law of 1879 had the

retroactive force claimed, the day after the law took effect and force, the husband could not have sold or mortgaged community real estate to obtain the money to pay an obligation which the creditor could have enforced against community real estate, without the consent of a third party, who had no such right when the property was accumulated and debts contracted. Was not the right to pay such obligation a valuable right? Suppose the husband was engaged in a mercantile business—in which one of the elements of success is unimpaired credit and a prompt meeting of all obligations—and the wife would not consent to a mortgage or sale of property to meet such an obligation; or was traveling in some foreign country, or was a lunatic, the creditor would then enforce such claim by attachment or execution. The ordinary result in such a case would be financial disaster and ruin and the wiping out of the savings of a lifetime.

Again, supposing such debt above mentioned was a community debt. It would have been just as necessary for the husband to obtain the consent and the actual joinder of his wife in a mortgage or deed to obtain the necessary cash to meet such community obligations. If this consent and joinder were not obtained, as above suggested, ruin and disaster must have followed in many cases.

Under the law of 1873 the husband had the right to give away the community property. It was through his efforts that the property was accumulated; it was by his economy that the property accumulated was preserved, not alone for the benefit of the community, but for his own individual benefit as well. It was property which he had accumulated to enjoy during life—

property that was to take care of him in his declining years, when he was no longer able to work or acquire property. It is no small part of the value that we place upon property or money that we may use it for the care and protection of those possibly, whom we are not legally bound to protect and care for. Frequently we value property, and acquire property and preserve our property that we may care and provide for a father or a mother who may be penniless; that we may provide for an invalid sister, who has no means to care for herself; to take care of an indigent friend, who in early years has possibly given his all to save us from financial ruin or death itself. If one had this right of gift when he acquired property, and which may have been the one thing that he acquired property for, it seems to me incompatible and wrong in principle that a legislature may deprive him of the power of utilizing this accumulation for such purposes. This right Bacon and others had under the law of 1873; but the law of 1879, if given a retroactive force took away from every husband in the State of Washington, the right to thus care for and maintain his family and friends in the conditions above mentioned, and would thus have deprived the husbands of this territory of a very valuable property right.

This right of gift of community property has been held by the supreme court of California to be a vested right which cannot be taken away without impairing the obligation of the husband's contract.

Spreckles v. Spreckles, 48 Pacific Rep., 228.

"The right to private property is a sacred right. It was not introduced as the result of princes' edicts.

concessions and charters, but it was the old fundamental law, springing from the original frame and Constitution of the realm."

Cooley, Constitutional Limitations, p. 358.

"The sense of property is inherent in the human breast, and the gradual enlargement and cultivation of that sense, from its feeble force in the savage state, to its full vigor and maturity among polished nations, forms a very instructive portion of the history of civil society. The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself."

2 Kent Commentaries, p. 318.

"The power of alienation of property is a necessary incident to the right of property, and was dictated by mutual convenience and mutual wants."

2 Kent Commentaries, p. 326.

The case of Third National Bank v. Divine Grocery Company, 97 Tennessee, 603, involved the validity of a legislative act that attempted to take from a solvent debtor the right to transfer his property in payment of his debts. In the course of its opinion, the court said:

"It is clear that this absolutely prevents the transfer, sale, pledge, or mortgage of all or any part of the property of any debtor, however solvent or insolvent, for the payment of any debt, however large or small, and that it denies him the privilege and power (denies to all solvent debtors, with any amount of property, as well as to all insolvent debtors) to pay all or any part of his indebtedness, large or small, without subjecting him to suit at the instance of other creditors, according to section 5 of the act, to sequester and ap-

propriate his property, and throw him into involuntary bankruptcy, and ruin his business and reputation as a consequence. * * * *

"The practical effect of this is to compel debtors to dispose of their property for cash, even when perectly solvent, and appropriate the cash to the debt, rather than exchange the property with the creditor on any advantageous terms which might be offered by the latter,—a result which it is obvious would but produce the greatest oppression, and hamper and hinder the citizen in the ownership and exchange of property, in a way that is absolutely intolerable if there be any fundamental law which will prevent. That fundamental law is found in section 8 of article 1 of the Constitution of the state, which provides that no man shall be taken or imprisoned or disseised of his freehold, liberties, or privileges, outlawed or exiled or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land. It is—and correctly—insisted that, while this act does not deprive him absolutely of his property, it takes away from him that element of its value which consists in the right to use and legitimately dispose of it; * * *

"It was decided in the case of Stratton Claimants v. Morris Claimants, 89 Tenn., 497, that, when the Constitution of this state was framed, the right to own, to hold, to enjoy, to alien, to devise, and to transmit property by inheritance was enjoyed to the fullness and perfection of absolute right, and one of the objects of the Constitution was to protect and preserve this right. To take from property its chief element of value, and to deny to the citizen the right to use and transfer it in any proper and legitimate method, is as much depriving him of his property as if the property itself was taken. Of course we need not repeat again the meaning the phrase in this connection, 'the law of the land.' It does not

need to be said that the deprivation provided against is not merely that which might result from an act of the legislature undertaking to take the property, or to deprive the citizen of its value, for any purpose. A subsequent constitutional provision (section 21 of art. 1) provides that no man's particular services shall be demanded or property taken or applied to public use without the consent of his representative, or without just compensation being made therefor. It has been held that private property may be taken for public use under this provision only upon just compensation, but not for private use at all. These general provisions in respect to the right to own property equally protect the right to use, enjoy, exchange, and transmit it, as held in the *Morris Case*, before referred to; and neither can be taken from the citizen by the arbitrary enactment of the legislature."

Third National Bank v. Divine Grocery Company, 97 Tennessee, 603.

If you take from a party the right to convey property, you make it impossible for him to sell it and use the proceeds in payment of debt. You also prevent the party from deeding any part part of it in payment of debt. If you take away the right to sell and to deed property in payment of debt, you take away such property as an asset in contracting a debt.

But the court has held that these rights were taken from the husband by the law of 1879 though he had each of them under the laws in force at the date of the purchase. Both rights were unrestricted and unlimited, and to this extent was the obligation of his contract of purchase impaired and his property taken from him without due process of law.

3. *Plaintiff in error has been deprived of his property without due process of law, if the decision of the supreme court of Washington is affirmed.*

As we have seen, the lower court has held that the law of 1879 did take from the husband the sole right to convey this property, the right to give it away, the right to pay from this property any debt he might contract. It also took from him the right to the possession, title and enjoyment of one-half of it in case his wife died before he did. As we have already suggested, with equal right and equal power it could have taken from him the sole right to convey, the sole right to the possession and the rents. It might with equal right have provided that upon the death of the wife the whole of it should go to the children of the wife.

Can the legislature thus strip a man of such rights? And if the attempt is made, does it not violate the fourteenth amendment?

It is claimed that a territory may pass a law impairing the obligation of a contract. But it is not claimed that it can deprive a man of his property without due process of law. We think that this question must be answered in the affirmative. In such a case the party thus aggrieved has no day in court, no chance to be heard, no redress. The legislature takes his property from him and transfers it to others without compensation.

It is admitted that this property was purchased with community funds, that is, funds acquired after marriage. It cannot be disputed that at the time it was purchased Mr. Bacon had absolute control and

management of those funds, and, if not a sole owner, had a part in trust therein. He saw fit to invest them in this property over which he had like control and in which he had like interest. This court is bound to say that he invested the funds with a view to the law then in force. It is bound to presume that each of the rights and privileges that he had in the property was a part of the inducement which led him to so invest such funds. Whether or not he would so invest them was entirely discretionary with himself. No one will say that he would not prize or consider valuable the right to use such property in the payment of any debt he might contract, or that such would not be considered valuable as an asset in contracting a debt. Who will pretend to say that he would not consider valuable the use of all this property for life in case of the prior death of the wife? What other incentive would there be in purchasing property? What is property worth to any man without any right to it, presently or prospectively? Is it not the merest mockery for a court to say that a man may be thus stripped of property rights, and yet have as valuable interest in the property as before? How much meaning would our constitutional provisions against the impairment of the obligation of contracts and depriving of property without due process of law have to such a man if they did not throw around him their protecting shield against such acts of confiscation by state or territorial legislatures?

In the celebrated Dartmouth College case Mr. Webster, in discussing What is due process of law, said:

"The plaintiffs had a legal right in this charter; and they had acquired property under it. The acts deprive them of both. They impair and take away the charter; and they appropriate the property to new uses, against their consent. The plaintiffs cannot now hold the property acquired by themselves, and which this article says they have a right to hold. They infringe the twentieth article. By that article it is declared that, in questions of property, there is a right to trial.. * * *

"By these acts, the legislature assumes to exercise a judicial power. It declares a forfeiture, and resumes franchises, once granted, without trial or hearing. If the constitution be not altogether waste paper, it has restrained the power of the legislature in these particulars. If it has any meaning, it is that the legislature shall pass no act directly and manifestly impairing private property and private privileges. It shall not judge by act. It shall not decide by act. It shall not deprive by act. But it shall leave all these things to be tried and adjudged by the law of the land. * * * * *

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It

would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country. 'Is that the law of the land', said Mr. Burke, 'upon which, if a man go to Westminister Hall, and ask counsel by what title or tenure he holds his privilege or estate according to the law of the land, he should be told, that the law of the land is not yet known, that no decision or decree has been made in his case; that when a deree shall be passed, he will then know what the law of the land is? will this be said to be the law of the land, by any lawyer who has a rag of a gown left upon his back, or a wig with one tie upon his head?' "

Dartmouth College v. Woodward.

Argument of Webster, 4 Wheat., 577—81.

In Westervelt v. Gregg, 12 N. Y., 202, the right of a husband to reduce a legacy to his wife to his own possession was held to be a vested right, and although he had not reduced it to possession prior to 1848, the passage of a law in that year could not devest him of the right. It was argued in opposition to this that the interest of the husband in the wife's legacy was a mere authority to collect it. The court said:

"This right, it is true, is personal, and no one can exercise it but the husband himself or his assigns, or, under certain circumstances, his representatives. It is not a right which can be taken in execution. Neither will a court of equity compel a husband to exercise it in favor of his creditors. But it is none the less valuable to the husband on that account. It is a right of a peculiar and restricted character, but it is fixed, cer-

tain and vested, and this case shows that it may be of great pecuniary value. * * * * * * *

"I think that the right of the respondent to recover the legacy of his wife, which existed at the time that the statute in reference to married women went into operation, was property within the meaning of the constitution, and that he has not been deprived of it by the statute."

12 N. Y., pp. 208—9.

Judge Denio says in the course of his opinion in the same case:

"I am of opinion that the act, in its application to this case, is a violation of the constitution of this state. Among the limitations of the powers of government contained in that instrument is the one which declares that 'no person shall be deprived of life, liberty or *property*, without due process of law.' That the right which the respondent had to this legacy, the instant before the act of 1848 took effect, was property, in the justest sense of that term, I cannot doubt. An immediate right of action for the recovery of money, which, when recovered, is to belong to the party in whom the right of action exists, subject to be defeated only by the contingency that a person in being may die before judgment can be obtained, is a valuable pecuniary interest, which deserves protection equally with rights which are absolute and unconditional. Besides, this was an interest which the respondent might sell, and for which he might receive the consideration to his own use. This property the act, if valid, has effectually deprived him of. It declares it shall no longer belong to him but shall be the property of his wife, as though she were a single female. The act does not fall within the meaning of *due process of law*. That term, according to Lord Coke, means being brought in to answer, according to the 'old law of the land.' "

Westervelt v. Gregg, 12 N. Y., 202, pp. 211—12.

In this case Mr. Bacon did not have the mere legal right to the possesseion but was actually in possession with the legal title and right to possession for life, with the right to sell or give in payment of any debt he had contracted or might contract, nothing in the laws contingently limiting any one of these rights.

II.

THE RIGHT OF SURVIVORSHIP GIVEN BY THE LAW OF 1875 AS TO THE COMMUNITY OF ACQUESTS AND GAINS WAS A VESTED RIGHT.

If we are right, under the law of 1873 Mr. Bacon was the sole owner of the property and the law of 1875 which gave the survivor the right to succeed to the whole of the estate did not add anything to his rights under his deed of purchase under the said law of 1873. It simply took from him the right of testamentary disposition and gave to the wife a vested right to succeed to the whole estate in case of the prior death of her husband.

But if the court should be of the opinion that under that law he was not the sole owner, then we claim that the law of 1875 did give him the right of succession to all the community property and this right of survivorship was a vested contractual right as distinguished from a mere expectancy. Whatever his rights were arose from his contract of purchase and the laws in force at that time, and did not accrue to him simply as heir of Mrs. Bacon.

The death of Mrs. Bacon did not confer upon Mr. Bacon for the first time the right of possession of this prop-

erty. He had it by reason of his purchase of the property. He had this right from the moment of the delivery of the deed and by reason of the deed. His right to sell did not accrue by reason of the death of his wife but by reason of his purchase and the laws in force at that time. He did not get the right of using this property in payment of debts through her or by reason of her death, but by reason of the purchase. Her death did not add anything to his rights. As we have shown, he had full property rights at the moment of the purchase. This is shown in another way.

In order for descent of property to be cast in its true meaning there must be ownership of the property in the decedent. It must descend from the real owner to the heir. In other words, to apply the rule Mrs. Bacon owned the property, and it descended from Mrs. Bacon to Mr. Bacon at her death. But supposing Mr. Bacon had died first. Then according to the same theory Mrs. Bacon would have taken as heir from Mr. Bacon. That being true, Mr. Bacon must have been the owner. In other words, under such a community law it would have been impossible to know whether the husband or wife was the owner until the death of one showed what was before such event undeterminable. Then would it for the first time be known who during all the years of the marriage relation had been the owner. This shows clearly that such a claim is without foundation, and that the survivor obtained his rights to property in some other manner. We say that whatever rights either husband or wife had in the property were acquired by purchase by the deed and the laws in force at the time of the purchase.

It is true that the act conferring upon the surviving spouse the right of survivorship was designated "An act of descent," and the court will find that as a rule in those states where the community law prevails the legislatures have usually included in the law of descent the law regulating the right of the surviving spouse, though technically and accurately neither spouse takes by descent. The real object of that portion of such an act is to designate the portion of the community property that the surviving spouse holds freed from participation in by the deceased spouse on account of the death of such spouse, and for this reason it within the scope and purpose of the act.

It will be observed also that frequently laws abolishing dower and curtesy, or regulating dower and curtesy are included in a law regulating the descent and distribution of property, though technically speaking the right of curtesy is not obtained by descent, yet no one would say they were foreign to the subject.

It would be a great wrong and injustice to hold that right of survivorship in community property accumulated while the laws of 1875 were in force could be taken from the husband. It was one of the rewards held out during those years to the husband to labor and economize in order to accumulate such property. It was the one and only reimbursement a husband could hope to receive for his separate estate consumed in building up and increasing the assets of the community.

Under the laws under which this property was acquired the wife's separate property as defined was hers and her heirs, forever. There was no way she could be deprived of this property except by her own act. It was in no manner liable for community debts. On the other hand the hus-

band's separate property was liable for his own debts and also all community debts. It was a fund which gave the community credit and support in its undertakings.

The above propositions being true, let us see what change the law of 1879 would make, giving it the retroactive force claimed. Under this act the lower court has held in Langert vs. Brotton, etc., 1 Wash., 73, that the community property is not liable for the separate debts of the husband. But that does not change the rule, and it could not as to existing creditors, that the separate property of the husband was still liable for antecedent community debts incurred prior to the passage of the act. A mere statement of these propositions shows how utterly unjust such a construction of the statute would be.

Suppose that Mr. Bacon had a valuable separate estate at the time the law of 1873 was enacted. As we have shown this estate was was liable for community debts. Suppose this estate was consumed in paying community debts by acts of community creditors, entirely wiping out the separate estate, but as a result, leaving at the date of the passage of the act of 1879 a very large community estate. This law goes into effect and Mrs. Bacon dies, as she did, a short time thereafter. This law, it is claimed, at once changes his right as successor to the whole, to that of successor to one-half, even though the community estate is very largely increased in the manner suggested, at the expense of his own estate. The half that the husband in such a case would succeed to, might even be much less than the value of his separate estate so consumed. In such case he would in reality, and as a matter of fact, succeed to none of the acquests and gains of the community. The husband would be powerless to prevent this result because he could not

prevent the creditors from enforcing their claims. The result would be just the same if the husband had voluntarily used his own separate property in satisfying community claims, because it would be a useless thing not to do that which the creditors could enforce. But if the law of survivorship is not changed it does not injure the husband, because if he has the management and control of the property, the rights to the rents and profits, and the right of survivorship, he has still the enjoyment of the property for life, though known by a different name. His real dominion and proprietary interest in the property is not gone.

Again, even after the law of 1879 was enacted, the husband's separate property was still liable for the community debts he should contract. Suppose at that time Mr. Bacon still had a large separate estate, as large as that of the community estate. In the manner above suggested this could be seized and sold in payment of community obligations, leaving the community property just that much larger. If his separate was equal to that of the community estate and the wife died he would likewise succeed in reality to none of the community acquests and gains, but would simply get an amount equal to his separate estate. The law in this manner would make a free gift of two-thirds of community property to children of Mrs. Bacon by a former marriage, one-third to a child of his own, and leave nothing to the man who had given his time, talents and life work toward its accumulation. The law provides no way, and there is none, so far as we know, by which the husband could make a charge against the community property for his separate property so consumed and so used. Could the legislature have intended the law to have a construction so unjust, so unreasonable? If it be given a prospective force

none of these results would follow. In the future he could so conduct his business that such harmful results could not come to his own separate estate. He could avoid contracting community debts that would be liable to consume his separate estate, or he could manage it so as to make the community property pay its own obligations and preserve to himself his separate estate.

As we have shown, in many cases the legislature might just as well have declared that the separate estate of the husband was forfeited to the community, or that all separate property of the husband should be considered community property, and that in case the husband should prove the longest liver he should succeed to one-half thereof. The result would have been just the same in many instances, as it would be to give the law the construction claimed.

The above is no improbable example. At the time of the passage of this act we venture the assertion that there were hundreds of similar cases in actual existence, and in such cases, under the laws in force from 1873 to 1879 the husband was powerless to prevent such a result. There was no reason why he should undertake to prevent such a result unless it be that every man who accumulates property must bear in mind and have a constant fear that the legislature may at any time in a moment of caprice enact a law depriving him of *his* property, regardless of the inhibitions of the Constitution of the United States as to the impairment of the obligations of his contracts. Under the laws of 1873 and 1875 there was no distinction except in name, so far as concerned the rights of the creditors and of the husband, between separate property of the hus-

band and the community property. He had the complete control over both, and the right to the possession and profits of both during his life. No difference can be shown by court or counsel. Under such laws there was no need or incentive to the husband to keep his separate property segregated from the community. The one was the same to him as the other. As soon as they became commingled they would at once assume the character of community funds, and no court could or would undertake to segregate them. There being no incentive or need to keep them separate, the law will presume that no man would go to the trouble or expense of keeping them separate. In fact, the law made it impossible for him to do so. At least, legislatures are presumed, in enacting laws affecting the business world, to intend that men will do and have done only those things necessary to preserve their rights and interest in property. So at the date of the passage of the law of 1879 the legislature must have known that business men during the preceding years had commingled their separate estate with community estate, sometimes voluntarily, other times involuntarily, knowing that, under the laws governing both, their rights were the same, and no necessity for a separation existed. It is not enough to say that people might expect a change in the laws so as to deprive the husband of one-half his property in case of the death of his wife. Every man has the right to presume that the laws in force at the time and place of the making of a contract and where it is to be performed, will govern his contract so far as he acquires any right in such contract by parting with any consideration therefor. This is what is guaranteed to him by the Constitution of the

United States. In this case Mr. Bacon makes the contract. He has the possession, the control and the ownership of the consideration which passes therefor. He is one of two parties to the contract. If he is presumed to be acting for the community he is also presumed to be acting for himself in so far as his interest in property is concerned, both for the present and the future. He would very naturally have the one view as well as the other. The fact of the dual interest, if such is the fact, does not change the rule. The law gives him this dual interest on the theory that both interests can be in the one at the same time and that those interests are in entire harmony. So we say the legislature, bearing all this in mind, shows by this section that the law was intended to be prospective only. And in view of the harmful results attending any other construction, the courts must so interpret it.

Again, let us suppose that Mr. Bacon on the morning of the 14th day of November, 1879, the day the law was approved, had in his possession and on his person $20,000 in money acquired while the laws of 1873 and 1875 were in force, and that a part of this represented his separate estate, but having been commingled with community funds as above suggested, the law would impress upon it the character of community funds. Under the laws existing at the time of its acquirement it was his for life, it was the same to him as his own separate estate, because he had the same use of it; he could give it away, he could at pleasure transfer it into other personalty or into realty, or he could keep it in money and use it for the maintenance of himself and family in accordance with his station in life. If his wife should die it was still his, but no more so

than it was before. Suppose that afternoon at 4 o'clock the law was approved and it at once went into effect and force. Shortly after midnight the wife should die. If the law has the effect and force claimed the title of one-half at once passed to the heirs of Mrs. Bacon, and they could claim the right to go into Mr. Bacon's pocket and withdraw therefrom $10,000. It would be of no avail for Mr. Bacon to say, when this property was accumulated it was to be mine for life. That much of this sum represents my separate estate, the balance represents every dollar that I have been able to acquire and to save by close economy during my whole married life. It was an incentive for me to labor and to save, because it was to be mine for life; it was to be mine just the same if my wife or if I should be the longest liver. Whatever my wife contributed to this sum was to be mine if I was the longest liver. What I gave of my separate estate, what I contributed by my labor and economy, was to be hers if she should be the longest liver. Can it be possible that the law could have such a result if so intended? If such was the scope and purpose of the act of 1879 would it not be taking from Mr. Bacon property that was his own? Would it not deprive him of the use of that property for the maintenance of himself and family? Was not the right to so use it a valuable right to Mr. Bacon? Was it not contingently worth to him just exactly the sum of $10,000? Would it not be taking from him the posession of property which, when accumulated, was his possession for life? Has not the right of possession of property always been considered a valuable right?

Again, under the agreed statement of facts Mr.

Bacon entered into the possession of this property as soon as it was purchased. His possession under the law was possession for life. He was entitled to the rents and profits of that property for life. If the law of 1879 is to be maintained, then by that law Mr. Bacon was ousted of the possession of one-half thereof. He was deprived of one-half of the rents and profits thereof.

2. *Even though the court should hold that the surviving husband takes as an heir, the old common-law rule that the law of descent can be changed has no application.*

Although we have clearly shown that the surviving spouse does not take as an heir, but as a purchaser, yet if it should be held that the survivor takes by descent, we maintain that the old common-law rule that "the law of descent can be changed without affecting vested rights," cannot apply to the right of survivorship in a community estate. No rule of law is better established than that where the reasons for a rule of law are wanting the rule itself fails. The reason that an heir expectant has no vested interest in the property of the ancestor is stated by Judge Cooley, as follows:

"A right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws. It must have become a title, legal or equitable, to the present or future enjoyment of property. * * * And it is because the mere expectation of property in the future is not considered a vested right that the rules of descent are held subject to change in their application to all estates not

already passed to the heir by the death of the owner. No one is heir to the living, and the heir presumptive has no other reason to rely upon succeeding to the property than the promise held out by the Statute of Descents. But this promise is no more than a declaration of the Legislature as to its present view of public policy as regards the proper order of succession,—a view which may at any time change, and then the promise may properly be withdrawn, and a new course of descent be declared. The expectation is not property. It cannot be sold or mortgaged. It is not subject to debts, and it is not, in any manner, taken notice of by the law until the moment of the ancestors's death, when the Statute of Descents comes in, and, for reasons of general public policy, transfers the estate to persons occupying particular relations to the deceased, in preference to all others. It is not until that moment that there is any vested right in the person who becomes heir to be protected by the Constitution. An anticipated interest in property cannot be said to be vested in any person, so long as the owner of the interest in possession has full power, by virtue of his ownership, to cut off the expectant right by grant or devise."

Cooley, Constitutional Limitations, pp. 359, 360.

All these reasons fail if we apply them to this case. Both the legal and equitable title had been in Mr. Bacon long before Mrs. Bacon died. He became possessed of both in June, 1878, the moment the property was purchased, and the deed delivered.

He immediately entered into the possession of it. He had the present enjoyment of it, the right to the rents and profits. It was no expectation. It was actually his in his possession with full legal right to and

dominion over it. All this property could be sold to pay his debts. Not so with the heir expectant. Mr. Bacon could mortgage this property. Not so with the heir expectant. Mr. Bacon had the right to give it away, exchange it or use it in the payment of his debts. Not so with the heir expectant. No one could deprive Mr. Bacon of any one of these rights. No one could take the possession from him. No one could deprive him of the title. No one could sell or mortgage or make any charge against this property except Mr. Bacon. All this being true, is it not absurd to say his interest was a mere expectancy, like that of an heir? Is it not folly, then, to attempt to apply to this case the rules governing a mere expectancy? In the heir there is no ownership. In Mr. Bacon there was full ownership. There is just as much, just the same, difference, between Mr. Bacon and an heir expectant as there is between an heir and his ancestor.

Mr. Bacon secured all these rights on account of his purchase of the property. It did not come to him by reason of the death of anybody, but by reason of his paying the necessary consideration for the property. He was the party of the second part to the contract. The heir expectant is never a party to the contract by which his ancestor obtains the property. Such an heir cannot say My contract has been impaired, because he has no contract.

Suppose the deed by which Mr. Bacon acquired this property had actually contained formal recitals conferring on him the rights given to a husband by the laws of 1873 and 1875: had provided that he should have the absolute dominion over it, the rights to the rents and profits and the right to the unrestricted dis-

position of it, and that it should be his and his heirs forever, unless Mrs. Bacon should survive him, in which case it should go to her upon his death. No one can deny that if a subsequent law, like that of 1879, were held to alter these provisions of the contract, it would impair the obligation thereof and deprive Mr. Bacon of his property without due process of law. And if, in attempting to so apply such subsequent law, a court should hold that the rights conferred by the deed were not vested, contractual rights, but constituted the husband a mere naked trustee, would this court hesitate to hold differently?

The effect of the laws of 1873 and 1875 upon the deed was exactly the same as if their provisions were actually incorporated therein. Mr. Bacon had every reason to rely on the effect of the laws in connection with his contract, and to contract in respect to those laws.

> McCracken v. Hayward, 2 How. 608, on pp. 613–4.

The reconstruction of the deed as above suggested, by literally embodying the provisions of the laws of 1873 and 1875 therein, emphasizes the fact that under that deed the husband was the sole owner of the property; the wife having nothing but the right to succeed to the ownership in case she survived her husband. Under defendants in error's theory she became a party to the deed by which Mr. Bacon purchased the land. Grant this. The only difference is that her right to the succession becomes a contingent remainder instead of a mere expectancy such as an heir enjoys. If she is a party to the deed, her and her husband's respective

rights in the property are forever governed by the laws then in force as much as if the provisions of the law were actually embodied in the contract, and the legislature can no more increase the rights of the wife to the diminution of the rights of the husband than it can summarily double the amount I bind myself to pay on a promissory note, or absolve me from payment entirely. The language of Chief Justice Marshall in the case of Fletcher v. Peck, 6 Cranch, 135, is in point:

"The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

"The correctness of this principle so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

"When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights. * * * *

"A contract executed as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

"Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory

and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, nothwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected."

Fletcher v. Peck, 6 Cranch, 135—7.

In the case of a grant, then, in a deed to A and B, by which A has the absolute dominion over the lands which are conveyed to him and his heirs forever, subject only to B's surviving him, in which event the remainder goes to B and his heirs, is it not equally the duty of this court to protect the rights of A from being impaired by a subsequent act of the legislature which attempts to place restrictions upon A's dominion over the property, and declares that if B dies before A, one-half of the property shall forthwith go to B's heirs?

In Green v. Biddle, 8 Wheaton, 84, this court says:

"The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however, minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation:"

One needs only to glance at the law of 1879 to recognize the condition it imposes which are not expressed in the deed by which Mr. Bacon purchased the property. Under his deed no restriction was expressed or could be inferred upon his right and authority to dispose of the property and do with it as he saw fit. The provision that, upon the death of the wife, her heirs should pass into possession of one-half of the property was a direct contravention of the contract evidenced by the deed as controlled by the laws of 1873 and 1875.

Mr. Justice Washington said, in his opinion in the case of Ogden v. Saunders, 12 Wheaton, 259:

"It is, then, the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout, wherever its performance is sought to be enforced.

"It forms, in my humble opinion, a part of the contract, and travels with it wherever the parties to it may be found."

The learned judge accordingly held that a bankrupt law enacted by the legislature of New York did not impair the obligation of subsequent contracts entered into in New York, within the inhibition of the Constitution, because such law became a part of such contracts.

"If, then, it be true that the law of the country where the contract is made, or to be executed, forms a part of that contract, and of its obligation, it would seem to be somewhat of a solecism to say that it does at the same time impair that obligation."

12 Wheaton, p. 260.

In those cases wherein this court has overruled the judgments of state courts upholding state insolvent laws as barring debts contracted prior to the enactment of such laws, this court would have experienced but little embarrassment from any statement of the state court to the effect that the liability of a debtor to a creditor was not such as could not be altered or released by a subsequent law. In the absence of some provision in the law of such state warranting such an assertion—some provision which the parties would presumably have in view when the debt was contracted, this court would naturally disregard so palpable an attempt to evade the federal question.

And so in this case, the supreme court of Washington could find justification for its disparagement of Mr. Bacon's rights under his contract of purchase, only in some provision of the law of Washington existing at the time of that purchase warranting such a construction. Nothing can be found in the laws of 1873 or 1875 or any other law of the territory affording such justification.

This identical question arose in Louisiana in the case of Dixon vs. Dixon where a law, designated a law of descent, gave the wife upon the death of the husband one-half of the community property. It appears that the Dixons were married in Pennsylvania in 1813. In 1816 the husband removed alone to Louisiana, where he engaged in business until his death in 1831. From the time he removed to Louisiana until 1828 the above mentioned law existed which gave to the wife upon the death of the husband one-half of the community acquests and gains. In 1828, or three years prior to his

death, this law was repealed. The property in question was acquired in Louisiana between the years 1816 and the repeal of the law in 1828, and the question arose whether or not the law in force at the time the property was acquired, entered into and became a part of the contract, so that the repeal thereof would not affect the interests of the surviving wife. The supreme court of Louisiana held that the law in force at the time of the acquisition of the property remained the law of the contract, and that the wife succeeded to the one-half thereof, and in so deciding used the following language.

"Property found in a succession is regulated by the law in force at the time it is opened, no matter how different or contrary thereto the rule may have been, when the estate was acquired. *It is of some importance to ascertain whether the same rule applies in regard to that which enters into the community of acquests and gains.*"

In other words is the interest of the wife in community acquests and gains the same as an heir? As to her does the law of descent (succession) which is in force at the date of the death of her husband, apply? This is the answer of the court:

"*We think it does not. The rights of the heirs arise "from the death of the ancestor. The rights of husband "and wife in the partnership of gains grow out of the "marriage contract and do not originate in its dissolution "and it is impossible to distinguish between the interest "proceeding from such a contract and that which springs "from any other agreement the law sanctions. If, there- "fore, by the law of the country where the marriage took "place a community of acquests and gains was declared to*

"be created by the marriage, or in the language of our code "superinduced of right by the contract, we should think "that a subsequent law declaring there should be no fur- "ther community between the persons who had entered into "this engagement would be retrospective, and as much a "violation of rights vested under the contract as the statute "would be which would alter the obligations imposed or "impair the rights acquired under a contract of sale or "of lease."

Dixon vs. Dixon, 4 La. (O. S.) 188.

By further reading of the opinion in Dixon v. Dixon *supra* it will be seen that though the court holds that under the civil law the wife's interest in community property was an expectancy, they reach the conclusion that it was a vested expectancy for the reason that if the husband should convey the community property in his life time in order to defraud her of her expectancy she could go into court after his death and set the same aside. But if it be held that the wife with so slight and weak an interest in property still had, by reason of such rights, a vested interest in the law of survivorship, with how much more force may it be said that the husband's right of survivorship, coupled with absolute right of dominion, was a vested right?

Her right of survivorship to any particular property might have been defeated by the husband, either by mismanagement, by conveyance or by gift, while the right of survivorship in the husband to any property like the one in controversy, could not be defeated by any other party, in any way directly or indirectly.

We are not contending that Mrs. Bacon's right of survivorship to this property so long as it remained

undisposed of, could have been taken from her by any subsequent legislation. We think it could not. But we do say the reasons of the rule apply with far greater force in Mr. Bacon's favor.

It will also be observed in the above case that Mrs. Dixon never took up her domicile in Louisiana, and that the marriage was contracted in Pennsylvania. But after discussing the point at length the court reach the conclusion that the statement of the law as above quoted should prevail.

3. *The lower court has held that the legislature could take from the husband the right of management and disposition of community property. It also held that the right of survivorship could be taken from him. This makes a man's interest in community property worthless.*

If Mr. Bacon took his right of survivorship under the law of 1875 as an heir, and the rule of law applies that the statutes regulating the succession of the surviving spouse can be changed and that neither husband nor wife has a vested right therein, then the legislature with equal power and right could have provided that the husband's right of survivorship should be reduced from a whole to a quarter or a tenth, or it could have entirely swept it away. It is no greater exercise of power in a legislature to take away the right of survivorship of the whole estate than it is one-half. This, too, even though by the same act it left the separate estate of the husband still liable for the community debts then in existence. This, too, even though he had contributed large sums of money from his separate estate as hereinbefore suggested for the preservation and accumulation of the community

property and through the law provided no way for reimbursement of such funds. This, too, even though every dollar he had accumulated or saved or earned had gone into the community estate as it necessarily must.

The lower court has held that the legislature by this act could and did take from the husband the sole right to convey, and cast a part of it on the wife. It must follow, then, that if the legislature could take away a part of the right to convey, it could take away from the husband the whole management and control of the community property, which would include the right to possession and the right to the rents and profits thereof.

It also held in this case below the legislature could take away from the husband the right of survivorship. We ask, in all candor, what vested proprietary right did a husband have in property that he had given his all to accumulate? None whatever, if such a decision may stand. Does not such law, so construed, amount to confiscation?

Suppose the legislature had so enacted on the 14th day of November, 1879. Previous to that day, as we have shown, all the community property was the same to Mr. Bacon, or any other husband in the then territory of Washington, as his own. On the day following every property right would have been swept away and he left penniless, though by his labor, skill and economy he had accumulated a fortune. Absolutely penniless would he have been left, without present or future right in the property he had so accumulated. Can it

be possible that a state or territory may enact a system of laws which provide conclusively that every dollar a married man may save and accumulate should be known as community property? And even though he should accumulate a fortune under these laws which give him all the property rights known to the law, yet any day he may be deprived of every interest therein by the will or caprice of a legislature?

There was no way by which he could accumulate anything else but community property. He had no privilege or right to accumulate a dollar and say it was his own separate estate, but by a law irresistible in its force it was and could be only *community property* in which he had absolutely no vested right. It would be immaterial whether at the time of such a change of laws a husband had passed the age of life when he could longer accumulate, but he must be left absolutely to the mercy of his friends or family. We say that such a claim of power in a legislature is absurd and has never been known in any English-speaking legislative body since the days of Magna Charta. It is contrary to every principle of law and sentiment of justice. Even before the adoption of the Constitution of the United States against the impairment of the obligation of a contract it would have fallen under the ban of the common law as against the "law of the land."

It is no answer to this argument to say that no legislature would attempt so sweeping a change, or enact so unjust a law. If the contention of respondents is true the legislature of 1879 *did* attempt to go at least one-half this far. It would be no more ridiculous, unjust or absurd for a legislature to enact such a

law than for counsel to contend that they had such an unlimited power.

If a marriage contract were entered into between man and wife, and in such contract there was a provision that the husband was to have sole management and control of all property accumulated by the joint labor of both, and that the survivor should succeed to it all, if property was accumulated under such a contract, we do not think it could be held for a moment that either party could be deprived of any single one of these provisions. But a contract so made and entered into would be of no more force and effect than laws giving like rights, privileges and powers, because under all the decisions such statutes would be a part of such contracts.

An heir who may hope and expect to obtain the property of his ancestor by descent cannot so complain. He is not a party to any contract of purchase of the property by his ancestor. He has no contract in which he can say the law of descent is a part. He enters into no contract, assumes no obligation in any contract in reference to a law of survivorship or descent. If the law of descent be changed he cannot say any contract of his has been impaired, because he had no contractual right in the property of his ancestor, in which the law of descent could be a part. If an heir expectant should say, my contract has been impaired by a change of law of descent, the court would properly ask, what contract of yours has been impaired? Were you a party to the contract or deed by which your ancestor obtained the property? Had you any recognized proprietary right in such property of your

ancestor during his life? Show us, name to us your contract that has been impaired.

4. *What is it to impair the obligation of a contract in the sense in which the word is used in the constitution of the United States?*

Fortunately for plaintiff in error this question has been determined over and over again by this court in his favor.

Webster's definition of Impair is, to make worse; to diminish in quality, value, excellence or strength; to deteriorate. Then, if the value of a contract is deteriorated or lessened by the passing of an act, the obligation of the contract is most certainly impaired.

"One of the tests that a contract has been impaired is that its value has been by legislation diminished. It is not by the constitution to be impaired at all. It is not a question of degree or manner or cause, but encroaching in any respect on its obligation—dispensing with any part of its force." Bank vs. Sharp, 6 Howard, 301.

It seems to us too clear for argument that we are within the protection of the Constitution so defined and explained.

Was not taking from Mr. Bacon the right of survivorship a diminishing in quality of his interest in this property? Was it not diminishing in quantity, contingently at least, just one-half? Was he not as a fact, under the findings of fact, within six months after the passage of the act, the owner of just one-half as large an interest in the property as he was entitled to under the laws in force at the time he purchased it?

Property, too, that he had purchased, and which was in his possession, and which when he entered into possession, was to be his so long as he did nothing personally to dispossess himself of it. If the law is to be given the retroactive force claimed, was his interest in the property as valuable on the 15th day of November, 1879, as it was on the 13th day of November, 1879? Would property have as much value to any man, with the right to the possession and the rents and the ownership of one-half contingently taken away. To state the proposition is to answer it. One might contend with just as much force and reason that the ownership of one-half of a piece of property is just as valuable as is the whole. Could not Mr. Bacon or any other husband in the then territory of Washington say with much force: You take from me the right of survivorship granted me by the laws in force at the time it was acquired, and you impair my contract under the above decisions.

Could an heir expectant make a like claim under a law of descent? As heretofore suggested, the court could very properly say, What contract did you enter into that has been impaired by the change of the law of decent. Show us a contract in which your name appears as a party, or show us a contract for which you paid any consideration express or by implication, and we will protect you. What place and time did you enter into a contract of which the law of descent was a part? You have no such contract. You simply get what the law gives you of another's property who is dead and who has not disposed of the same by devise or otherwise.

Plaintiff in error contends that the right of survivorship in a husband comes within all well-recognized definitions of a vested right in realty. Washburn's work on Real Property, 4th edition, page 34, Volume 1, defines a vested right as follows:

"If the nature of the interest, ownership, or estate which may be had in real property, as above described, is considered, it will be found that it is divided into vested and contingent, executory and executed, according as it is absolute or uncertain, or the subject of present or future possession and enjoyment. Without undertaking to discriminate nicely, as some writers have done, as to the precise meaning of these terms in all their relations, it will be sufficient, in this stage of the work, to give their more usual and generally received sense. Thus, an estate is *vested* when there is an immediate, fixed *right* of present or future enjoyment. An estate is *contingent* when the right to its enjoyment is to accrue on an event which is dubious and uncertain. *Executed*, applied to estates, seems to be used as substantially synonymous with *vested*, while *executory*, though it relates to the future enjoyment of the property is not necessarily contingent. A contingent interest, as above defined, would be executory. So might a vested one be, and would be, if future in its enjoyment, so far as relates to the possession."

We say Mr. Bacon's right in this property was a vested right at the moment the property was acquired, for at that time there was an immediate, fixed right of both present and future enjoyment. Neither present nor future enjoyment was contingent, because there was no way known to the law by which he could be deprived of either. The right of sole conveyance and disposition placed him in such a position that neither

his present right of possession, nor future possession of the whole of the property could in any manner be defeated.

Again, we say this is the distinction between an heir expectant and a husband under the commuity laws of 1873 and 1875. The heir's right in the law of descent was not a vested right of any nature or description until the death of the ancestor. He had no present right of enjoyment that might not be defeated either by a change of law or by his ancestor selling, disposing, conveying or devising the property.

5. *The estate known at common law as an estate by entirety probably more nearly resembles the estate created by the laws of 1873 and 1875 than any other common law estate, and the rules of construction applicable thereto will throw much light on this question.*

This estate bears a close resemblance to a joint estate and in fact was early termed a joint estate and the husband aud wife termed joint tenants.

The distinction is this, that in an estate by entirety neither of the parties could in any way defeat the right of survivorship in the other, and the only way it could be terminated was by death or divorce. If under the law of 1873 the husband could not have conveyed the whole estate except by the wife joining him in the conveyance, then we should have had an estate identical with the common law estate by entirety.

See Washburn on Real Property, 4th Edition, Vol. 1, 672.

In that estate, as we claim in this, the survivor did

not take a new acquisition at the death of the other spouse, but "his estate was simply freed from participation by the other." The courts are uniform in holding that whenever an estate was created by entirety, no subsequent law could take from either spouse the right of survivorship. Judge Deady, in construing a statute under which it was held by one of the parties that an estate in entirety had been abolished by the laws of Oregon, held that such a statute could not abolish the right of survivorship without being contrary to the Constitution of the United States.

"Upon the argument it was insisted by counsel for the defendants that the conveyance by Baker and Pittock to Myers and his wife vested in them an estate as tenants by entirety of the undivided two-thirds of the premises, which neither could dispose of without the assent of the other, and which upon the death of Myers remained in his wife absolutely. * * * When this act took effect, Tobias Myers and M. M. Myers were, if ever, no longer 'persons having an undivided interest' in the two-thirds of this property conveyed to them by Baker and Pittock. On the contrary, the husband's interest ceased with his life, and thereafter the wife held the estate alone. Nor do I think the result would have been different if the statute had taken effect during the life of the husband; for although Myers and wife were two natural persons, yet in contemplation of law they were but one, and on the death of either, that legal personage was represented by the survivor, who was entitled to hold the estate as before. *In my judgment the legislature had not the power to divest the survivor of this right in the property without her consent; and it would not be presumed that such was the intention in passing this act, so long as it admits of any other construction.*"

Myers vs. Reed, 17 Federal Reporter, 402.

The supreme court of Illinois has reached the same conclusion. The syllabus clearly states the effect of the decision and we are content to quote only from that:

"*Estate by the entirety—when it exists. Prior to the act of 1861 a deed of conveyance to a husband and wife created a joint estate in them by the entirety during their natural lives and to the survivor on the death of either, and the rights of the parties to a vested and absolute title to such an estate could not be changed, modified, or affected by the act.*"

Michael Harper vs. Walner, 80 Illinois, 197.

The supreme court of Kentucky recognizes the same rule.

"Although the language and construction of the enactment relative to such estates might be construed to apply to existing titles and abolish the right of survivorship between husband and wife and change the estate of an entirety into one in common, *yet as the language is not necessarily expressive of such an intention we would not hasten to give it a retrospective application, especially in view of a want of constitutional authority in the legeslature to so enact.* * * * By the law joint tenants could destroy the right of survivorship by the sale of their respective portions or by compelling, which they could do, partition, while this peculiar tenancy of husband and wife could not be destroyed by the sale of either, nor could partition be compelled by any means known to the law. * * * As the entire title and estate was vested in both husband and wife the legislature could not have diverted any of the title, and we must presume it did not intend to do so."

Elliot vs. Nichols, 4 Bush, 502.

See also Gresham vs. King, 65 Mississippi, 387.

In a case recently decided in New Hampshire that court holds that a statute abolishing tenancy by entirety cannot be retroactive.

Stilphen vs. Stilphen, 23 Atlantic Reporter, 79.

It will be seen by reading the above authorities that one of the main reasons advanced in holding that a statute abolishing tenancy by entirety cannot be retroactive in its nature is that each tenant having such an estate that he could not be deprived of it except by his own act, the legistature cannot take it from him without his own consent, and of course his consent would not be presumed. But under the laws of 1873 and 1875 Bacon had greater interests in this property than that of a tenant by entirety. It was impossible under the law by act of any party or by any court to deprive Bacon of his right of survivorship and the right to possession and the profits and rents during life. As has already been shown under the civil law and the decisions of the courts of Louisiana, New Mexico and California he was the sole owner; had exclusive right of sale and had the exclusive possession for life. Then surely his right of survivorship ought to be equally well protected with the right of a tenant by entirety under the constitutional provision of the United States, as to the impairment of the obligation of contracts.

6. *The estate of joint-tenancy bears a strong resemblance to the estate created by the laws of 1873 and 1875, but nearly as strong to the estate of entirety.*

Under the common law there is another estate termed joint estate, in which the right of survivorship maintains. The principal difference between joint estate and estate by entirety is the fact that in a joint estate the right of survivorship may be defeated. First, by a joint tenant selling his right during the life of the other joint tenant. Second, either joint tenant might come into court and secure a decree of partition which would sever the joint estate and defeat the right of survivorship. The courts are about evenly divided on the question whether, or not, a ligislature by enacting a retroactive law can abolish the right of survivorship in joint estates. In an early decision in Massachusetts—Miller vs. Miller, 16 Mass., 260, the court reaches the conclusion that a joint estate might be abolished by a statute retroactive in its force, and that such retroactive statute would not impair the obligation of a contract. The reasons given for this conclusion are as follows:

"The statute in its terms applies to estates created before as well as after its enactment. The principle is nevertheless correct, that legislatures cannot impair the title to estates, without the consent of the proprietor unless for public objects, when an adequate compensation shall be provided. But there can be no objection to the operations of any legislative act retrospectively, which shall enlarge or otherwise make more valuable the title to an estate, for the consent of the holder may always be presumed to such acts."

They reach the conclusion that an act changing a joint estate to an estate in common increases the interest of each joint tenant rather than diminishes it, stating that if the act lessened the interest of either joint tenant it would be unconstitutional.

This was an early case, and was followed in Pennsylvania in the case of Bambaugh vs. Bambaugh, 11 S. & R., p. 193, and also by New Hampshire in the case of Miller vs. Dennett, 6 N. H., p. 109. But the decision in the latter case is of little weight as authority, because in the case of Stilphen vs. Stilphen, 23 At. R., p. 79, the supreme court of New Hampshire questions the correctness of the conclusions of this decision and holds that the interest of a tenant by entirety cannot be affected by retroactive statute. But, even following the rule laid down in the Massachusetts case, it will at once be seen that it is not authority on the question before the court, because Mr. Bacon's interest in the survivorship could not have been defeated by any act or deed of Mrs. Bacon, or any other party. Neither Mrs. Bacon nor any other party could have brought an action for partition. Mr. Bacon's interest was not increased or made more valuable by the law of 1879, but, on the contrary, it was greatly reduced. Surely, taking away from Mr. Bacon the right of survivorship to one-half of this property left Mr. Bacon a lesser interest in the property than he had before the passage of the law, and gave to him no additional or enlarged right. It simply deprived him of the right of survivorship without giving him anything in return. It might also be added that it gave nothing additional even to Mrs. Bacon, but in the same way made her interest as well as Mr. Bacon's interest in the property less valuable, and gave it to parties in no way interested in the original contract.

The more recent authorties hold contrary to the

above decisions. The supreme court of New Jersey goes into the question more fully than any other court that we have been able to discover, and the reasons they give for the conclusion they reach seem to us unanswerable. The decision in part is as follows:

"In Green vs. Biddle, 8 Wheat. R., 84, the Supreme Court of the United States says: 'The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes; imposing conditions not expressed in the contract; or dispensing with the performance of those which are, however, minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.' And I think it may be safely added, that any law which changes the influence and legal effect of an existing contract, as between the original parties thereto, or as between parties claiming under it, gives to one a greater and to the other a less interest or benefit in the subject matter of the contract, than by its terms or legal operation they would be entitled to, is a law 'impairing' its 'obligations' within the meaning of the constitution. Apply these principles to the case before us, and if the act in question is retrospective, it seems to me to be directly in conflict with that provision in our national charter which prohibits any legislative violation of contract.

"The rights of the parties in this suit depend upon a contract made and entered into, prior to the year 1812, by and between Andrew Bell, of the one part, and Jacob Berden (the father of the lessor of the plaintiff) and Van Ripper (the defendant), of the other part. By the terms of the contract, Berdan and Van Ripper became seized of and entitled to an estate in joint-tenancy. When the deed was made in 1804 the

terms in which it was written created a joint-tenancy, just as distinctly and strictly as a deed now made expressly declaring the intention of the grantor to make such an estate would do it. If the parties intended that Mr. Bell should convey to them and that they should take the lands in joint-tenancy, and in no other way, they used the very form of words to express their meaning and create such an estate. If such was their intention (and we are bound to presume that it was), then, until the parties chose to modify or put to an end their contract in such way as they lawfully might, they were bound by it. If one joint-tenant was aged and infirm and the other had youth and health on his side, he had a vested right in the chance of survivorship and the beneficial interest incidental to such an event; a right that could only be defeated by his own act or by the act of his co-tenant in his life time. The probability of surviving the other tenant arising from disparity of age and other circumstances, may have been the moving consideration with the defendant (Van Ripper) for becoming a joint purchaser, or with the donor for making a joint conveyance.

"The defendant in this case has survived his joint-tenant and he claims the benefit of his contract; he sets up a title to the whole of the premises by the very terms of that contract, and how does the plaintiff answer this claim? Not by denying the defendant's title under the deed, the written contract of the parties, but by asserting that the legislature has passed an act altering the force and effect of the deed, changing the rights of the parties under it, and converting what was an estate in joint-tenancy into another and different estate. He admits that, under the deed, the defendant has title to the whole, but insists that, in virtue of the statute, he has title but to one moiety of the premises. Which shall prevail? The deed or the statute? The contract of the parties or the authority of the legisla-

ture? The constitution of the United States or the enactment of our general assembly?

"The learned counsel for the plaintiff considered this a remedial statute, and urged upon us that remedial and mitigating statutes might be retrospective and yet valid. This is cheerfully conceded in all cases where such remedy or mitigation is not violation of existing contracts. But, if the deed under which the defendant claims, is not a contract within the meaning of the constitution of the United States, I do not know what it is. Again, it was contended that as either of the grantees might by his own act have severed the joint tenancy, and as the legislature might provide for and even enable one joint tenant to compel the other into a partition without any infraction of constitutional law, therefore they might with the same propriety effect a severance of the estate at once by a positive enactment. But I do not think so. I may cancel my bond and release my debtor from his obligation, but the legislature cannot therefore declare it null and void or good only for half the amount due upon it. So the legislature may by statutory regulations enable one partner to compel his associate in trade to settle up the concern and put an end to the co-partnership; but it cannot alter the terms of the partnership or change the rights and interests of the parties in the assets of the firm."

The supreme courts of Mississippi and California both follow the decision of the supreme court of New Jersey.

Deu vs. Van Ripfer et al., 16 N. J. L. 11.

Gresham vs. King, 65 Miss., 387.

Greer vs. Blanchard, 40 Cal., 194.

Then if we apply the common law rule of survivor-

ship in those estates where it was recognized, we must reach the conclusion that the right of survivorship in Mr. Bacon to the property in controversy, was a vested right under the laws in force at the time it was acquired.

CONCLUSION.

It was contended by the defendants in error in the lower court and concurred in by that court that the case of Holyoke v. Jackson and that of Mabie v. Whittaker and other cases established the law of this state, and even though our constitutional right against the impairment of the obligation of our contract had been infringed, and though our property had been taken from us without due process of law, yet as the law had been settled against our contention, our constitutional rights must yield to "the settled law."

This is the bulwark behind which lawyers with a weak case when hard driven, so frequently take refuge. That it is good public policy to have our decisions uniform and the law settled, we admit. But this consideration must yield to a higher public policy established by the supreme law of the land, the constitution of the United States. None of the rights conferred upon the citizens of the United States by that instrument may be invaded by any state law or construction of any state law by the supreme court of any state. Whenever a citizen of any state is so aggrieved and appears at the bar of this court in due form of law, this court will hear him and give him redress. This court will not ask him if it is the settled law of his state that its legislature may pass laws impairing the obligation of contracts and depriving parties of property without due

process of law, or whether it is the settled law of his state established by the decisions of its courts that a certain act of the legislature did not so infringe his constitutional rights, nor would this court be controlled by it if such was the case. On the contrary it would examine the case and if it reached the conclusion that his rights were thus invaded, it would give him the necessary relief. The fact that A, B and "forty others" may have presented this question to our supreme court and have acquiesced in a decision which gave effect to the law of 1879 which impaired the obligation of their contracts is no reason why C should do the same, especially when his rights accrued prior to any such decisions, and it is no reason why C should not sue out his writ of error to this court and claim the protection of the constitution, nor why this court should not shield and protect him in his constitutional rights which are sacred and inviolable. The fact that one man or forty men have had their property taken from them without due process of law is no good reason why mine should be taken from me. If such a state of affairs should have any influence at all upon this court, it should prompt it to act all the more vigorously to save forty or a hundred more in the enjoyment of their property.

The lower court says: "Rights have been established and have grown up under these decisions which it would be wrong to disturb, even if the rule as was originally announced is faulty." The opinion shows that the lower court was in much doubt as to the correctness of its conclusions as well it might be, because in each of the various cases relied upon as authority the court was as evenly divided as the number would permit.

But we claim as a whole that no rights, in the larger

sense of the term, could grow up under these decisions, for the very reasons announced in those decisions. Because under them, no man or woman in the state of Washington has any vested right in community property. The courts of that state have held that a husband's interest in property is governed not by the law in force at the time he acquires it, but by any law that a subsequent legislature may enact. Under those decisions a man may know what his rights in community property are today, or until the next legislature meets, but no longer. Today he has the management and control of the community property that he has earned and saved since marriage. Tomorrow the legislature may take it from him and give it all, or part of it, to his wife, or some third party. Today he has the right of gift of personal property. Tomorrow this right may be taken away, even as to the property he now has. Today he may be engaged in mercantile pursuits in which all his property is personalty which he has the sole right to sell or mortgage. Tomorrow the legislature may take it wholly or in part away from him and give it to his wife, so he will be compelled to get her consent to use money already his with which to pay a personal debt. He will then be compelled to get her consent to sell a note or mortgage to pay such a debt. He will have to get her consent to sell any goods he may have on hand. He will have to get her consent to continue in business, to collect interest on a mortgage already owned, or to collect rent on property already acquired. Today he has the right, in case of his wife's death, to succeed to one-half of the property acquired since 1879. Tomorrow the legislature may take that away.

If the law should be changed tomorrow and the law of 1873 re-enacted giving the husband the sole right to com-

munity property it would be of little value because no one could foretell how long it might remain the law, and property rights would subsequently change as the law might be amended. All the valuable rights acquired while a community law is in force can be taken from him by subsequent legislation. Under those decisions there is no stability of property rights.

The highest court of the state of Washington has thus decided that there is no vested right in community property. It has thus authoritively unsettled the law of property. By its decisions a man may only say what his rights in property are today. His rights are not determined by the law in force at the time he acquires property but by the law in force at the time any controversy may arise concerning them. We venture the assertion that no such rule has been announced in an English speaking court for several hundred years. As a matter of public policy it is of far more importance to the people of the state of Washington that it be settled whether or not they hold their titles by so weak and frail a tenure as dependence upon the whim and caprice of subsequent legislatures. Probably ninety per cent. of our property in this state is community property and owned by half a million people. It is of transcendent importance to them to know if they have any vested interests in such property. It is of the greatest moment to them to know that, if by toil, economy and business skill, they accumulate property, the rights they have in such property at the time of its acquisition, are fixed and vested. Shall he who thus acquires property have the use and enjoyment of it, or may subsequent legislatures make a free gift of it to some one else.

Such a state of the law is unendurable; and there

is no escape from it as to property already acquired except in a decision from this court. There is no escape from it in the future as to future acquisitions unless the community property law is entirely abolished or unless we get relief in this case.

It is important to the plaintiff in error that he succeed and hold the property he has lawfully acquired and for which he has paid full consideration. He claims the rights guaranteed to him by the constitution of the United States, and to this end prays for a reversal of the judgment of the supreme court of the state of Washington in the above cause.

Respectfully submitted,

S. WARBURTON,

Plaintiff in Error.

APPENDIX.

The Law of 1873.

AN ACT defining the rights of husband and wife.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington*, That all property, both real and personal, of the wife owned by her before marriage, and that acquired afterward by gift, bequest, devise, or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterward, by gift, bequest, devise, or descent, shall be his separate property.

SEC. 2. All property acquired after the marriage by either husband and wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property.

SEC. 3. A full and complete inventory of the separate property of the wife, exclusive of money in specie, shall be made out and signed by the wife, acknowledged or proved in the manner required by law for the acknowledgment or proof of a conveyance of land, and recorded in the office of the auditor of the county in which the parties reside, and from time to time thereafter a further or supplemental inventory shall be made out, signed, acknowledged or proved, and recorded in like manner of all other separate property afterward acquired by the wife, excepting money whilst in specie and unconverted, and the rents and profits of her separate property included in the original or any subsequent inventory, if the same be money, so long as it shall remain in specie and unconverted.

SEC. 4. If there be included in any such inventory any real estate lying in other counties, such inventory shall also be recorded in such counties.

SEC. 5. The filing of any such inventory in the auditor's office shall be notice of the title of the wife, and all property belonging to her included in the inventory, as well as all money in specie not so included, shall be exempt from seizure on execution for the debts of her husband; and she shall be deemed to have waived the exemption from such

seizure on execution of all property belonging to her not included in any such inventory, other than money in specie.

SEC. 6. The husband shall have the management and control of the separate property of the wife during the continuance of the marriage; but no alienation, sale or conveyance of the real property of the wife, or any part thereof, or any right, title, or interest therein, and no contract for the alienation, sale or conveyance of the same, or any part thereof, and no lien or incumbrance created thereon, shall be valid for any purpose unless the same be made by an instrument in writing, executed by the husband and wife, and acknowledged by her as provided for in the acts concerning conveyances in case of the conveyance of her separate real estate. The separate personal property of the wife excepting money in specie, shall not be sold, assigned, or transferred, unless both husband and wife join in the sale, assignment or transfer thereof.

SEC. 7. When any sale shall be made by the wife of any of her separate property for the benefit of her husband, or when he shall have used the proceeds of such sale, with her consent in writing, it shall be deemed a gift, and neither she nor those claiming under her shall have any right to recover the same.

SEC. 8. If the wife has just cause to apprehend that her husband has mismanaged or wasted, or will mismanage or waste her separate property, she, or any other person in her behalf, may apply to the district court for the appointment of a trustee to take charge of and manage her separate estate; such trustee may, for good cause shown, be from time to time removed by the court and another appointed in his place. Before entering upon the discharge of his trust he shall execute a bond, with sufficient surety or sureties, to be approved by the court, for the proper performance of his duties. In case of the appointment of a trustee for the wife, he shall account for and pay over to the husband and wife, or either of them, the income and profits of the wife's estate, in such manner and proportion as the court may direct.

SEC. 9. The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate. When it shall be provided by the terms of the instrument whereby any property may have been bequeathed, devised, or given

to the wife, that the rents and profits thereof shall be applied to her sole and separate use, the entire management and control of the rents and profits of such property shall belong to the wife.

SEC. 10. The separate property of the husband shall not be liable for the debts of the wife contracted before the marriage, but the separate property of the wife shall be and continue liable for all such debts.

SEC. 11. In every marriage hereafter contracted in this Territory, the rights of husband and wife shall be governed by this act, unless there is a marriage contract containing stipulations contrary thereto.

SEC. 12. The rights of husband and wife married in this Territory prior to the passage of this act, or married out of this Territory, but who shall reside and acquire property herein, shall also be determined by the provisions of this act, with respect to such property as shall be hereafter acquired, unless so far as such provision may be in conflict with the stipulations of any marriage contract.

SEC. 13. All marriage contracts shall be in writing, and executed and acknowledged or proved in like manner as a conveyance of land is required to be executed and acknowledged or proved.

SEC. 14. When a marriage contract shall be acknowledged or proved, it shall be recorded in the office of the auditor of the county in which the parties reside, and also in the office of the auditor of every county in which any real estate may be situated which is conveyed or affected by such marriage contract.

SEC. 15. When any marriage contract is deposited in the auditor's office for record, it shall, as to all property affected thereby in the county where the same is deposited, impart full notice to all persons of the contents thereof.

SEC. 16. No marriage contract shall be valid, or affect any property, except between the parties thereto, until it shall be deposited for record with the auditor of the county where the parties reside; and if it relates to real estate in other counties, with the auditor of the county where the parties reside; and if it relates to real estate in other counties, with the auditor of the county wherein such property is situated.

SEC. 17. A minor capable of contracting matrimony may enter into a marriage contract, and the same shall be valid as if he were of full age, provided it be assented to in writ-

ing by the person or persons whose consent is necessary to his marriage.

SEC. 18. A marriage contract may be altered at any time before the celebration of marriage, but not afterward.

SEC. 19. The parties to any marriage contract shall enter into no agreement the object of which shall be to alter the legal order of descent, either with respect to themselves in what concerns the inheritance of their children or posterity, or with respect to their children between themselves, nor deteriorate from the rights given by law to the husband as the head of the family, or to the surviving husband or wife as the guardian of their children.

SEC. 20. No stipulation of any marriage contract shall be valid which shall derogate from the rights given by law to the husband over the persons of his wife and children, or which belong to the husband as the head of the family, or to the surviving husband or wife as the guardian of their children.

SEC. 21. A married woman may make and execute powers of attorney for the sale, conveyance, or incumbrance, of her real or personal estate, provided her husband joins in the execution of the instrument, and the same be acknowledged and certified in the manner provided by the law for the conveyance of her real estate.

SEC. 22. Any conveyance executed under and by virtue of such power of attorney shall be executed, acknowledged and certified in the same manner as if the persons making such powers of attorney were unmarried.

SEC. 23. A married woman shall have the right to revoke such power of attorney by any revocation thereof made and executed by her, and acknowledged and certified in the manner that conveyances by married women are required to be acknowledged and certified, and it shall not be necessary for the validity of such revocation that her husband shall join in the execution thereof.

SEC. 24. All powers of attorney heretofore made and executed by any married woman with her husband, and acknowledged and certified in the manner provided in section twenty-four of this act, and all conveyances heretofore and hereafter executed under and by virtue of such powers of attorney, and acknowledged and certified in the manner provided in section twenty-two of this act, shall be valid and binding: *Provided*, That no rights already vested in third

persons shall be affected by anything in this section contained.

SEC. 25. This act to take effect and to be in force from and after its passage.

Approved Nov. 14, 1873.

(Session Laws of 1873, p. 450.)

The Law of 1875.

AN ACT to regulate the descent of real estate and the distribution of personal property.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* When any person shall die seized of any lands, tenements or hereditaments, or any right thereto, or entitled to any interest therein, in fee-simple, or for the life of another, not having devised the same, they shall descend subject to the debts as follows:

1st. If the decedent leaves a surviving husband or wife and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leaves a surviving husband or wife, and more than one child living or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child by right of representation. If there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation.

2nd. If the decedent leaves no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father and mother, if both survive. If there be no father nor mother, then one-half goes in equal shares to the brothers and sisters of the decedent and to the children of any deceased brothers or sisters, by right of representation. If decedent leaves no issue, nor husband, nor wife, the estate must go to his father and mother.

3d. If there be no issue, nor husband, nor wife, nor father and mother, nor either, then in equal shares to the

brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation.

4th. If the decedent leaves a surviving husband or wife and no issue, and no father nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife.

5th. If the decedent leaves no issue, nor husband, nor wife, and no father nor mother, nor brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestor must be preferred to those claiming through an ancestor more remote, however.

6th. If the decedent leaves several children or one child and the issue of one or more other children, and any such surviving child dies under age, and not having been married, all the estate that comes to the deceased child by inheritance from such decedent, descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

7th. If at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent, descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation.

8th. If the decedent leaves no husband, wife or kindred, the estate escheats to the Territory, for the support of common schools, in the county in which the decedent resided during lifetime, or where the estate may be situated.

SEC. 2. Upon the death of husband or wife, the whole of the community property, subject to the community debts, shall go to the survivor, but nothing herein contained shall be construed to conflict with laws exempting property from attachment and execution, and specially the provision securing the homestead to the survivor, and all property except as an allowance for support of the family.

SEC. 3. The provisions of section one, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents; and take the place of

tenancy in dower and tenancy by the curtesy, which are hereby abolished.

SEC. 4. Every illegitimate child shall be considered as an heir to the person who shall in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as heir of his mother, and shall inherit his or her estate in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried, and his father, after such marriage, shall have acknowledged him as aforesaid, and adopted him into his family, in which case such child and all the legitimate children shall be considered as brothers and sisters, and on the death of either of them intestate, and without issue, the others shall inherit his estate and be theirs, as heretofore provided in like manner, as if all the children had been legitimate, saving to the father and mother respectively their rights in the estates of all the said children, as provided heretofore in like manner as if all had been legitimate.

SEC. 5. If any legitimate child shall die intestate without lawful issue, his estate shall descend to his mother, or in case of her decease, to her heirs-at-law.

SEC. 6. The degree of kindred shall be computed according to the rules of the civil law, and the kindred of the half blood shall inherit equally with those of the whole blood in the same degree.

SEC. 7. Any estate, real or personal that may have been given by the intestate in his lifetime as an advancement to any child or other lineal descendant, shall be considered a part of the intestate's estate so far as regards the division and distribution thereof among his issue, and shall be taken by such child or other descendant, toward his share of the intestate's estate.

SEC. 8. If the amount of such advancement there exceed the share of the heir so advanced, he shall be excluded from any further portion in the division and distribution of the estate, but he shall not be required to refund any part of such advancement, and if the amount so received shall be less than his share, he shall be entitled to so much more as will give him his full share of the estate of the deceased.

SEC. 9. If any such advancement shall have been made in real estate, the value thereof shall, for the purposes of the preceding section, be considered as part of the real estate to be divided, and if it be in personal estate, and if in either case it shall exceed the share of real or personal estate respectively, that would have come to the heir so advanced, he shall not refund any part of it, but shall receive so much less out of the other part of the estate as will make the whole share equal to those of the other heirs who are in the same degree with him.

SEC. 10. All gifts and grants shall be deemed to have been made in advancement, if expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant.

SEC. 11. If the value of the estate so advanced shall be expressed in the conveyance, or in the charge thereof made by the intestate, or in the acknowledgment by the party receiving it, it shall be considered of that value in the division and distribution of the estate, otherwise it shall be estimated at its value when given.

SEC. 12. If any child or lineal descendant so advanced, shall die before the intestate, leaving issue, the advancement shall be taken into consideration in the division and distribution of estate, and the amount thereof shall be allowed accordingly by the representatives of the heir so advanced, as so much received towards their share of the estate in like manner as if the advancement had been made directly to them.

SEC. 13. The word "issue," as used in this act, includes all the lawful lineal descendants of the ancestor, and the words "real estate," include all lands, tenements, and hereditaments, and all rights thereto, and all interests therein possessed and claimed in fee-simple, or for the life of a third person.

SEC. 14. Inheritance or succession by right of representation takes place when the descendants of any deceased heir take the same share or right in the estate of another that their parent would have taken if living. Posthumous children are considered as living at the death of their parent.

DISTRIBUTION OF PERSONAL ESTATE.

SEC. 15. When any person shall die possessed of any separate personal estate, or of any right or interest therein not lawfully disposed of by his last will, the same shall be applied and distributed as follows:

1st. The widow, if any, shall be allowed all articles of her apparel or ornament, according to the degree and estate of her husband, and such provisions and other necessaries for the use of herself and family under her care, as shall be allowed and ordered in pursuance of the provisions of any law; and this allowance shall be made as well when the widow receives the provision made for her in the will of her husband as when he dies intestate.

2d. The personal estate remaining after such allowance, shall be applied to the payment of the debts of the deceased, with the charges for the funeral and the settling of the estate.

3d. The residue, if any, of the personal estate, shall be distributed among the same persons as would be entitled to the real estate by this act, and in the same proportion as provided, excepting as herein further provided.

4th. If the intestate leave a husband and issue, the husband shall be entitled to one-half the residue.

5th. If there be no issue, the husband shall be entitled to the whole of the residue.

6th. If the intestate leave a widow and issue, the widow shall be entitled to one-half of said residue.

7th. If there be no issue, the widow shall be entitled to the whole of the residue.

8th. If there be no husband, widow or kindred of the intestate, the said personal estate shall escheat to the Territory, for the use of common schools in the particular county in which the intestate shall have resided at time of death.

SEC. 16. If the intestate leave a widow and issue, and any relation have received an advancement from the intestate in his lifetime, the value of such advancement shall not be taken into consideration in computing the one-half part to be assigned to the widow, but she shall be entitled to the one-half only of the said residue, after deducting the value of the advancement.

SEC. 17. Acts and parts of acts upon any subject-matter herein provided for, be and the same are hereby repealed.

SEC. 18. This act to take effect and be in force from and after its passage.

Approved November 12, 1875.

(Session Laws of 1875, p. 53.)

The Law of 1879.

AN ACT relating to and defining the property rights of husband and wife.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington*, That all property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is her separate property, and all property owned by the husband before marriage and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is his separate property.

SEC. 2. All other property acquired after marriage by either husband or wife, or both, is community property, except such as may be acquired as is provided in the first section of this act.

SEC. 3. A full and complete inventory of the separate personal property of the wife shall be made out and signed by her, and she shall also verify the same before an officer authorized to administer oaths, to the effect that the property therein mentioned is her separate personal property, and such inventory must be recorded in the office of the auditor of the county in which the wife resides.

SEC. 4. The filing of the inventory in the auditor's office is notice and *prima facie* evidence of the title of the wife.

SEC. 5. The husband shall have the management and control of the separate real property of the wife during the continuance of the marriage, but he has not power to sell or incumber or in any way dispose of the separate real estate of the wife or any interest therein without the wife joins with him in selling, incumbering or disposing of the same by executing with him a deed to that effect, and such deed must be acknowledged by her and her husband as provided in the acts concerning the acknowledgment of deeds: *Pro-*

vided, however, That all such separate real estate shall be subject to the liens of mechanics and others for labor and material furnished in erecting structures and improvements thereon as provided by law in other cases.

SEC. 6. The separate personal property of the wife shall not be sold or otherwise transferred or incum[illegible], unless both husband and wife join in and consent [illegible] such sale, transfer, or incumbrance.

SEC. 7. The husband has the management and control of the community personal property with a like absolute power of disposition—other than testamentary—as he has of his separate personal property.

SEC. 8. The husband has the management and control of the community real property, but he shall not sell, convey or incumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or incumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife as deeds of her separate estate are acknowledged: *Provided, however*, That all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases.

SEC. 9. The husband has the absolute power of disposition of his separate personal property, but he shall not sell, convey or incumber his separate real estate unless the wife joins with him in executing the deed or other instrument of conveyance, by which such real estate is sold, conveyed or incumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife as deeds of her separate estate are acknowledged: *Provided, however*, That all such separate real estate shall be subject to the liens of mechanics and others, for labor and material furnished in erecting structures and improvements thereon, as provided by law in other cases.

SEC. 10. The wife may, without the consent of her husband, sell or convey her separate personal property, but where her separate real property is to be conveyed or incumbered, the deed of conveyance or incumbrance shall be void, unless her husband join with her in executing said deed, and the same is acknowledged as other deeds are required by law to be acknowledged.

SEC. 11. A married woman may dispose of all her separate estate by will, without the consent of her husband, and may alter or revoke the will in like manner as if she were single. Her will must be attested, witnessed and proved in like manner as all other wills. A husband may also dispose of his separate estate, by will, and, in addition thereto, may in like manner dispose of one-half of the community estate.

SEC. 12. Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts

SEC. 13. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living or none of their representatives living, then the said community property shall all pass to the survivors, subject to the community debts, and to the exclusion of collateral heirs, the family allowance and the charges and expenses of administration.

SEC. 14. The earnings of the wife are not liable for the debts of the husband.

SEC. 15. The earnings and accumulations of the wife and of her minor children living with her, or in her custody while she is living separate from her husband, are the separate property of the wife.

SEC. 16. The separate property of the husband is not liable for the debts of the wife contracted before the marriage.

SEC. 17. The separate property of the wife is not liable for the debts of the husband, but is liable for her own debts contracted before or after marriage.

SEC. 18. No estate is allowed the husband as tenant by courtesy, upon the death of his wife, nor is any estate in dower allotted to the wife, upon the death of her husband.

SEC. 19. The property rights of husband and wife are hereafter to be governed by this act (unless there is a marriage settlement or post-nuptial agreement, as hereinafter provided, containing stipulations contrary thereto) any act to the contrary notwithstanding.

SEC. 20. All contracts for marriage settlements must be in writing and executed and acknowledged or proved, in

like manner as a grant of land is required to be executed and acknowledged or proved.

SEC. 21. When such contract is acknowledged or proved, it must be recorded in the office of the auditor of every county in which any real estate may be situated, which is granted or affected by such contract.

SEC. 22. The recording or non-recording of all such settlements, has a like effect as the recording or non-recording of a grant of real property.

SEC. 23. A minor capable of contracting marriage may make a valid marriage settlement: *Provided*, It be assented to in writing by the person or persons whose consent is necessary to the marriage of such minor.

SEC. 24. The parties to any marriage settlement shall enter into no agreement, the object of which shall be to alter the legal order of descent, either with respect to themselves in what concerns the inheritance of their children or posterity, or with respect to their children between themselves, nor derogate from the rights given by law to the husband, as the head of the family.

SEC. 25. Nothing in this act contained shall prevent the lien of a judgment or decree obtained against the husband, from attaching to the separate real estate of the husband, and the community real estate, if the provisions of law now in force are complied with, as to the filing of such lien in the auditor's office, within the time now fixed by law: *Provided*, That only one-half of the community real estate shall be liable for a debt contracted by the husband before marriage: *And provided further*, That nothing in this act shall be so construed as to subject the homestead of husband and wife to such lien, save only to the same extent as now provided by law.

SEC. 26. The husband cannot select a homestead from the separate property of the wife.

SEC. 27. The husband has the right, notwithstanding the provisions in this act, to give, or otherwise convey, to his wife, by direct conveyance, any right, title or interest that he may have in any property, and the wife is not required to acknowledge or execute any such conveyance and she may show in any proceeding affecting such property, that the same is a gift to her, notwithstanding the deed or other conveyance fails to express that it was a gift: *Provided*, That nothing herein contained shall prevent creditors of the hus-

band, when such gift is made to defraud them, from setting such deed or conveyance aside and subjecting such property to other debts.

SEC. 28. If the wife has just cause to apprehend that her husband has mismanaged or wasted or will mismanage or waste her separate property, she may apply to the district court or judge thereof for the appointment of a trustee to take charge of and manage her separate estate; such trustee may, for good cause shown, be from time to time removed by the court or judge thereof and another appointed in his place. Before entering upon the discharge of his trust, he shall execute a bond with sufficient surety or sureties, to be approved by the court or judge thereof, for the proper performance of his duties. In case of the appointment of a trustee for the wife, he shall account for and pay over to the wife the income and profits of her estate; or the court, in its discretion, or the judge thereof, may in place of a trustee give to the wife full authority to take charge of and manage her own estate to the exclusion of her husband.

SEC. 29. Nothing contained in any of the provisions of this act, or in any law of this Territory, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals and to be witnessed, acknowledged and certified in the same manner as deeds to real estate are required to be, under the laws of the Territory, and the same may at any time thereafter be altered or amended in the same manner: *Provided, however*, That such agreement shall not derogate from the rights of creditors, nor be construed to curtail the powers of the district courts to set aside or cancel such agreement for fraud or under some other recognized head of equity jurisdiction, at the suit of either party.

SEC. 30. The rule of common law that statutes in derogation thereof are to be strictly construed has no application to this act. This act establishes the law of this Territory, respecting the subject to which it relates, and its provisions and all proceedings under it shall be liberally construed with a view to effect its object.

SEC. 31. This act shall not be construed to operate retrospectively and any right established, accrued or accruing or anything done prior to the time this act goes into effect shall be governed by the law in force at the time such right was established or accrued.

SEC. 32. All acts and parts of acts in any manner conflicting with the provisions of this act, or on the subject-matter thereof, be and the same are hereby repealed.

SEC. 33. This act to take effect and be in force from and after its passage and approval by the governor.

Approved, Nov. 14, 1879.

(Session Laws of 1879, page 77.)